Supreme Court, U.S.
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No. 96-21

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In The

Supreme Court of the United States

October Term, 1995

McDERMOTT, INC.,

Petitioner,

versus

CAPITAL WELDING & FABRICATION, INC. AND LANDRY ENTERPRISES, INC. OF MORGAN CITY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI OF McDERMOTT, INC.

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QUESTIONS PRESENTED FOR REVIEW

I.

Does Section 5(c) of the Longshoremen's and Harbor Worker's Compensation Act preempt otherwise applicable state anti-indemnity legislation?

II.

Does Section 5(c) of the LHWCA apply to a contract which, though performed by the use of a vessel in maritime commerce, is found to be "non-maritime" by the Court?

III.

When a contract is in fact performed, in whole or in part, on a vessel in navigable waters, is it a maritime contract notwithstanding the absence of the term "vessel" in its wording?

LIST OF PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal:

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7. Alan A. Zaunbrecher, 3850 North Causeway Boulevard, Suite 440, Metairie, LA 70002, Agent and Attorney-in-Fact for Aetna Casualty & Surety Company;

8. Honorable Charles R. Fulbruge, III, Clerk of United States Court of Appeals, Fifth Circuit, 109 John Minor Wisdom, U. S. Court of Appeals Building, 600 Camp Street, New Orleans, LA 70130;

9. Honorable Rebecca F. Doherty, Judge, United States District Court, for the Western District, Lafayette-Opelousas Division, 200 Federal Building, 705 Jefferson Street, Lafayette, LA 70501;

10. Honorable Robert H. Shemwell, Clerk of United States District Court, Western District, Lafayette-Opelousas Division, 1167 Federal Building, 300 Fannin Street, Shreveport, LA 71101-3083.

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REPORTS OF OPINIONS BY PRIOR COURTS

The opinion of the United States District Court for the Western District is reported at 899 F. Supp. 1551 (W.D. La. 1994). The Court of Appeals' opinion is reported at 79 F.3d 20 (5th Cir. 1996).

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

This is a petition for a Writ of Certiorari from the Fifth Circuit Court of Appeals from a decision which was entered on March 29, 1996. Jurisdiction in the District Court was premised on 28 U.S.C. 1333 and 28 U.S.C. 1367. The jurisdiction of this Court is invoked pursuant to Article 3, Section 2, Clause 2 of the United States Constitution and 28 U.S.C. 1254. Considerations governing review of certiorari include Supreme Court Rule 10, Sections (a) and (c).

STATUTES AT ISSUE IN THIS CASE

33 U.S.C. 905(c)

43 U.S.C. 1333

La. R.S. 9:2780

These statutes are reproduced in the appendix at App. 36-44.

STATEMENT OF THE CASE

McDermott, Inc., is one of the largest marine construction companies in the world and maintains one of the most active fleets of offshore construction equipment. In the Gulf of Mexico, McDermott derrick barges compete for the right to construct facilities related to the production of oil and other minerals from the Outer Continental Shelf. Many citizens of Louisiana and Texas are employed, either directly by McDermott or through temporary labor contractors, for this purpose. Their work carries them into the marine environment on a daily basis, and when there employed, McDermott vessels are frequently used as their home base and work station.

The question now pending arises from just such a situation. Mark Wagner was employed by Landry Enterprises as a welder. His work aboard the McDermott Derrick Barge 51 and the offshore oil platform it was employed to construct was the subject of a contract between his employer and McDermott which contained a reciprocal indemnity agreement as contemplated by 33 U.S.C.A. 905(c).

In this case, McDermott – the owner of the DB 51, which was the vessel ultimately implicated in a 905(b) claim brought by Wagner, an admitted OCSLA-extension longshoreman – is still shaking its corporate head three years later, trying to understand why the Fifth Circuit Court of Appeals considers the contractual arrangements of this company "non-maritime" with respect to the operation of its vessels.

The contract at issue, it is true, contains no provision describing the location of its performance. However,

Wagner's total employment with Landry pursuant to the McDermott agreement was on an oil platform miles out in the Gulf of Mexico which McDermott could only assemble using a vessel.

McDermott had a contract with Freeport McMoran Resource Partnership to install certain portions of that company's platform at Main Pass Block 299, a location in the Gulf of Mexico on the Outer Continental Shelf.[1] To perform this work, McDermott used the DB 51, a movable marine appliance fitted with a crane, living quarters, machinery, and crewed by technical personnel proficient in offshore construction work. Not having motive power of its own, the DB 51 was towed to location by a sister vessel and deposited in place on the 26th day of May, 1991, three days before Wagner arrived.

Although his work was primarily on the fixed platform, Wagner and his crew used the DB 51's living quarters and other facilities. Wagner claimed injury resulting aboard the DB 51 when he slipped in soapy water on his way to the head on the second day of his employment.

As a result of his claimed injury, Wagner filed suit on April 26, 1993, in the United States District Court for the Western District of Louisiana. He first alleged status under the Jones Act[2] as a member of the crew of the DB 51. McDermott responded with a third party complaint

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[1] 43 U.S.C. 1331, *et seq.*

[2] 46 U.S.C. 688, *et seq.*

against Landry invoking the contract's reciprocal indemnity clause, and claiming Wagner was a Landry employee at the time of his accident.[3]

On June 13, 1994, Wagner amended his complaint to state a claim against Landry as his Jones Act employer, and amended his count against McDermott to invoke the vessel negligence/unseaworthiness remedies of § 905(b) of the Longshore and Harbor Workers' Compensation Act.

The District Court disposed of Wagner's claims for seaman status by summary judgment. McDermott then moved for summary judgment on its third party demand against Landry, and for enforcement of its reciprocal defense and indemnity agreement under § 905(c). Landry opposed the motion, arguing the contract was not "maritime" by nature, and that Louisiana law, which barred any indemnity in favor of McDermott, applied by virtue of the OCSLA. By agreement of the parties, the matter was ultimately submitted on the merits for determination of the legal issues involved.

The District Court ruled in favor of Landry, finding that, because McDermott's blanket subcontractor's agreement with Landry did not specifically say that Wagner

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[3] There is some confusion whether Wagner was employed by Landry or by Capital Welding and Fabrication, the other respondent in this case. While this confusion does exist, it is of little moment; each company had an identical contract with McDermott, and there was a blanket subcontractor's agreement between Landry and Capital which, in essence, provided for the "sharing" of employees. The two companies are treated as the same for purposes of this Application.

was to work aboard a vessel, it was not a "maritime contract." Thus, Louisiana law applied pursuant to the OCSLA, and as a result, the indemnity was barred.[4] The District Judge's first opinion characterized McDermott as a "platform owner." When McDermott's Motion for Reconsideration pointed out its status as "vessel owner," the Court amended its judgment to find that McDermott, as owner of the DB 51, was not entitled to pursue its claim for indemnity because it had not included the word "vessel" in its agreement with Landry Enterprises covering Wagner's employment.

The Court of Appeals for the Fifth Circuit affirmed the District Judge's opinion on essentially the same basis on March 29, 1996, and from that decision this writ proceeds.

ARGUMENT

Few companies operate in maritime commerce more often than McDermott. That being so, it came as something of a surprise that an agreement covering workers who assisted in the mission of its offshore construction barge were present on its vessels by virtue of a non-maritime contract. This odd ruling is the result of extreme confusion which yet exists in the Fifth Circuit over the maritime/non-maritime line, even after a major decision

[4] An indemnity agreement such as that contained in the McDermott/Landry contract would be completely barred, as well as would any collateral insurance agreement, by means of the Louisiana Oilfield Indemnity Act, La. R.S. 9:2780.

on that very issue last term by this Court.[5] This confusion continues to reign, leaving room even for the doctrinaire and, some might argue, simplistic result reached here: a contract is maritime *only* if it *specifically* uses the term "vessel" on its face.

This result will likely not be limited to the case at hand. Because the Court of Appeals for the Fifth Circuit is pre-eminent in maritime law among the circuit courts, its opinions in lightly-litigated areas[6] are almost uniformly accepted as the national rule pending action by this Court.[7]

This case presents the first opportunity given this Court to establish a national rule regarding 33 U.S.C. 905(c), a 1984 Congressional amendment to the LHWCA intended by the Congress to create a uniform national rule governing stevedore-vessel contractual relationships in maritime commerce.[8] The Fifth Circuit apparently

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[5] *Jerome B. Grubart & Sons Inc. v. Great Lakes Dredge & Dock*, ___ U.S. ___, 115 S.Ct. 1043 (1995).

[6] There are but five reported circuit court decisions on Section 5(c) of the LHWCA at this writing, including this one: *Wagner v. McDermott, Inc.*, 79 F.3d 20 (5th Cir. 1996); *Campbell v. Sonat Offshore*, 979 F.2d 1115 (5th Cir. 1992); *Masinter v. Tenneco Oil Co.*, 867 F.2d 892 (5th Cir. 1989); *Fontenot v. Mosa Petroleum Co.*, 791 F.2d 1207 (5th Cir. 1986); *Knapp v. Chevron USA, Inc.*, 781 F.2d 1123 (5th Cir. 1986).

[7] *Papai v. Harbor Tug and Barge Co.*, 67 F.3d 203 (9th Cir. 1995).

[8] *CTI-Containier Leasing Corp. v. Oceanic Operations Corp.*, 682 F.2d 377 (2d Cir. 1982); *Kossick v. United Fruit Co.*, 365 U.S. 731, 735, 81 S.Ct. 886, 890, 6 L.Ed.2d 56 (1961).

doesn't believe this, all evidence to the contrary notwithstanding. This Court should correct that misinterpretation.

The circuit courts universally consider contracts which call for the use of vessels to be within the purview of the national maritime law.[9] The opinion in this case illustrates the panel's rote exclusion of any other contract – even one, as here, which clearly governs operations in maritime commerce – when the magic word "vessel" does not appear inside the four corners of the agreement. Such a stilted approach has, in this case, classified a cause of action arising under Federal maritime jurisdiction as on an equal footing with one governed by adopted state law.[10] As such, the challenged decision has an impact on maritime commerce which operates in practice to apply inconsistent state systems to maritime matters.[11]

Uniformity of result is often the predicate for this Court's intervention in protection of the federal maritime

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[9] *Kirno Hill Corp. v. Holt*, 618 F.2d 982 (2d Cir. 1980); *Jack Nelson, Inc. v. Tug Peggy*, 428 F.2d 54 (5th Cir. 1970); *Goodman v. 1973 26 Foot Trojan Vessel*, 859 F.2d 71 (8th Cir. 1988); *Royal Ins. Co. of America v. Pier 39 Ltd. Partnership*, 738 F.2d 1035 (9th Cir. 1984).

[10] 43 U.S.C. 1333(a)(2)(B).

[11] For instance, although Louisiana's Oilfield Indemnity Act, La. R.S. 9:2780, bars all indemnity arrangements and their collateral insurance arrangements, Texas allows the indemnity up to the limits of the available insurance coverage. Vernon's Tex. Civ. Practice & Remedies Code, Sec. 127.001, *et seq.* Mississippi has no such law. In the three states in the Fifth Circuit, then, McDermott would have faced three different treatments of its contract.

law[12] because of the adverse impact on an important area of the national economy caused by patchwork rules.[13] The same object can at least be implied by the relatively recent amendatory action of the Congress on the statute which is the subject of this Application.[14]

The Fifth Circuit's artificially harsh exclusion of this particular contract from the protection of Federal law has an unquestioned effect on maritime commerce and, as a result, is at odds with this Court's oft-declared policy choice.

A. A *GRUBART* MARITIME NEXUS

Beyond any question at all, the accident in this case occurred on a vessel which was undertaking offshore construction activities on behalf of the owner of a fixed platform, traditional maritime activity.[15] The "general features"[16] of the incident at issue are inherently maritime: *vessel negligence* which created an *unseaworthy condition* which resulted in personal injuries sustained *on a vessel in navigable water*. Such a claim, and its collateral

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[12] *The Lottawanna*, 88 U.S. 558, 22 L.Ed. 654 (1875); *Baggett v. Richardson*, 342 F.Supp. 1024 (E.D. La. 1972), *affd.* 473 F.2d 863 (5th Cir.)

[13] *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 61 L.Ed. 86, 37 S.Ct. 524 (1917); *Maryland Cas. Co. v. Cushing*, 347 U.S. 409, 98 L.Ed. 806, 74 S.Ct. 608 (1954).

[14] Part (c) was added to § 905 in 1984.

[15] *Grubart v. Great Lakes Dredge & Dock*, ___ U.S. ___, 115 S.Ct. 1043, 130 L.Ed.2d 1024 (1995).

[16] *Sisson v. Ruby*, 497 U.S. 358, 110 S.Ct. 2892, 111 L.Ed.2d 292 (1990).

contractual enforcement, necessarily has a "potentially disruptive impact on maritime commerce."[17]

Wagner has status as a longshoreman under either of two regimes. Federal statute[18] extends this remedy to him if he is a "platform worker," but so does the definitional section of the LHWCA.[19] Because he was, at the time of his injury, engaged in "maritime employment," Wagner is entitled to his vessel negligence action in any case. The nature of that action doesn't change depending on how he obtains his status to pursue it. It begins, and ends, within the Federal maritime jurisdiction.[20]

The following, then, is beyond dispute in this case:

1. Wagner was a statutory longshoreman by virtue of the OCSLA extension.[21]

2. Wagner claimed entitlement to damages by reason of an injury he sustained on McDermott's vessel, allegedly caused by the unseaworthiness of that vessel, granted him by a Federal statute passed pursuant to Congress' right of control of this Court's admiralty jurisdiction;[22]

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[17] *Grubart*, supra at note 15.

[18] 43 U.S.C. 1333(b).

[19] 33 U.S.C. 902(3).

[20] *Yamaha Motor Corp. U.S.A. v. Calhoun*, ___ U.S. ___, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996).

[21] The District Court and Court of Appeal acknowledged this fact by the very nature of their opinion accepting the applicability of Louisiana law, namely, La. R.S. 9:2780, through the OCSLA adoption.

[22] 33 U.S.C. 905(b); *Crowell v. Benson*, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932).

3. Landry Enterprises, Inc., Wagner's employer, contracted with McDermott on a reciprocal basis for indemnity, exactly as contemplated by § 905(c).

The flaw in the Fifth Circuit's analysis can best be demonstrated by review of the only Louisiana case on point,[23] which easily located the statutory preemption the Federal Circuit Court misplaced. The case has strikingly similar facts. There, a welder brought suit against a contractor and the owner of a construction barge for injuries suffered while performing repairs and structural work on a platform located on the Outer Continental Shelf. The vessel third-partied the contractor seeking to enforce the indemnity. The District Court entered summary judgment, and the Louisiana First Circuit Court of Appeal affirmed using the reasoning put forward by Applicants here. Perhaps most significantly, this Louisiana court found the Federal statute preempted state law.[24]

B. LEGISLATIVE HISTORY

Since this Act has received little judicial gloss, review of the legislative history would ordinarily provide illumination and support for whatever decision the Court of Appeal reached.[25] The history of this legislation is scant; but, when read together with well-established doctrinal

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[23] *Lewis v. Diamond Services Corp.*, 637 So.2d 825 (La.App. 1 Cir. 1994).

[24] *Lewis v. Diamond Services Corp.*, 637 So.2d 825 (La.App. 1 Cir. 1994).

[25] *Bonham v. District of Columbia Library Admin.*, 989 F.2d 1242 (D.C. Cir. 1993).

rules establishing the consistent remedies which form part of the scheme of the LHWCA, any logical analysis places the questioned statute neatly within the established remedies of maritime law.

Congress passed the LHWCA in 1927 to create a federal system of no-fault compensation for non-seaman maritime workers.[26] This Court has long recognized Congress' authority to enact the LHWCA it found through Article III's Admiralty Clause and the national Legislature's right to control the jurisdiction granted thereby. This Court has defined the due process parameters of the LHWCA by saying:

> In amending and revising maritime law, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction.[27]

There is, then, no doubt Wagner's claim against the vessel is maritime, either of its own weight or, by the reasoning propounded above, because § 905(b) was adopted as a maritime, as opposed to a landward, right of action.

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[26] 33 U.S.C. 901 *et seq.* When this statute was enacted it reduced the remedies of longshoremen and harbor workers, because the year prior to its enactment, this Court held that such workers could be recognized as "seamen" within the meaning of the Jones Act if they were injured on navigable waters while performing work traditionally done by seamen. *International Stevedoring Co. v. Haverty*, 272 U.S. 50, 47 S.Ct. 19, 71 L.Ed. 157 (1926).

[27] *Crowell*, 285 U.S. 22, 55, 52 S.Ct. 285, 294, 76 L.Ed. 598 (1932) (citations omitted).

The application of the Longshore Act to offshore workers such as Wagner originated in 1953 through another federal statute, the Outer Continental Shelf Lands Act ("OCSLA").[28] In adopting the LHWCA as the compensation scheme, OCSLA also specifies the tort law applicable to third-party claims by platform workers against vessels. As such, OCSLA itself is the apparent source for an express overlap between admiralty and OCSLA jurisdiction because OCSLA specifies that Wagner's claims against McDermott as vessel owner are governed by § 905(b) of the LHWCA.

> In the event that the negligence of a vessel causes injury to a person entitled to receive benefits under this chapter by virtue of Section 1333 of Title 43, then such person or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel in accordance with the provisions of Subsection (b) of this section.[29]

At the same time the apparent overlap between the OCSLA and admiralty in this context may be more technical than substantive. A § 905(b) claim against a vessel owner is a general maritime law cause of action in negligence, as are all § 905(b) claims whether arising in the

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[28] 43 U.S.C. 1331 *et seq.* The LHWCA compensation scheme was extended to workers on oil drilling rigs on the Outer Continental Shelf in 1953, which is after the development of *Sieracki* seamen status but before the evolution of *Ryan* indemnity. 43 U.S.C. 1333(b).

[29] 33 U.S.C. 905(c); *Moore v. Phillips Petroleum Co.*, 912 F.2d 789, 791 (5 Cir. 1990).

context of OCSLA or otherwise.[30] By comparison, claims by injured OCSLA workers against third-parties (non-employers) alleging platform-based fault are governed by adjacent state law.

Before the enactment of § 905(b), Wagner's only claim as a "stevedoring employee" against McDermott, the vessel owner, would have been as a "*Sieracki* seaman."[31] The foundational reasoning of *Sieracki* placed the right of action granted to persons in Wagner's position within the protection of the admiralty jurisdiction of the federal courts, and by extension, the federal maritime law of the United States.[32] So when the Congress enacted § 905(b) in 1972, it did so under clear Constitutional authority.

As this Court very recently noted: "[W]ith admiralty jurisdiction comes the application of substantive admiralty law."[33] In this case, Wagner's claim, asserted in his pleadings to reside in federal court because of 28 U.S.C.A. 1333 jurisdiction, falls under the admiralty. By his claim, Wagner invoked the " . . . application of substantive admiralty law." It is illogical to say contractual relationships designed to

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[30] *Robertson v. Arco Oil & Gas Co.*, 766 F.Supp. 535, 537 (W.D.La. 1991), *aff'd* 948 F.2d 132 (5 Cir. 1991).

[31] *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946).

[32] *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946), *reh. den.* 328 U.S. 878, 66 S.Ct. 1116, 90 L.Ed. 1646 (1946).

[33] *Yamaha Motor Corporation U.S.A. v. Calhoun*, ___ U.S. ___, 116 S.Ct. 611, 133 L.Ed.2d 578 (1996), ___, citing *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986).

govern Wagner's maritime claim are regulated by a patchwork of state laws applied through the OCSLA.

The fundamental error of the District Court and the Court of Appeal was in conducting a search for something that wasn't lost. By looking for a "vessel-related" contract, their analysis ignores the fundamental fact that Wagner *created* a maritime claim in which McDermott found itself ensnared.

The logical rule of *Yamaha*,[34] *Foremost v. Richardson*,[35] and to some extent *Grubart*,[36] requires this Court to find the reciprocal indemnity provision of the McDermott/Landry Enterprise contract are governed by federal law, including § 905(c), rather than any state law which would otherwise bar the indemnity.

Thus framed, the issue is not whether Louisiana law has any application, which it clearly does not; rather, the question is whether the general maritime law of its own force or federal maritime law as applied through the OCSLA (§ 905(b) of the LHWCA) governs. Or more precisely framed, because there is no practical effect on the plaintiff's claim whether the application of the § 905(b) negligence standard or the general maritime law negligence standard of reasonable care[37] is employed, the true

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[34] *Yamaha*, supra.

[35] *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982), *reh. den.* 459 U.S. 899, 103 S.Ct. 198, 74 L.Ed.2d 160 (1982).

[36] *Grubert*, supra.

[37] See, *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959).

controversy here is between application of the general maritime law or OCSLA to McDermott's claim for contractual indemnity from Landry. Contractual indemnity is generally *permitted* under maritime law,[38] yet *prohibited* (unless reciprocal) in a Louisiana case arising under OCSLA.

The OCSLA applies to artificial islands and fixed structures on the outer continental shelf beyond state jurisdiction, and the LHWCA is applicable to offshore workers *without regard* to any status or situs test.[39] The test for coverage is whether the offshore operations were a "but for" cause of the injury.[40] If this test is satisfied in the sense that Wagner's injury would not have occurred but for the extractive activities on the outer continental shelf, he is covered under the LHWCA whether the injury occurred on the fixed platform or on navigable waters. Since Wagner's alleged injuries would not have occurred "but for" the extractive activities being conducted on the Outer Continental Shelf he is covered by the LHWCA by virtue of the OCSLA and not because he may or may not qualify as a longshoreman as a result of status or situs. This is significant because § 905(c) only applies to non-seaman workers like Wagner. Section 905(c) provides in pertinent part:

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[38] *Angelina Casualty Co. v. Exxon Corp., U.S.A., Inc.* 876 F.2d 40, 42 (5 Cir. 1989).

[39] *Nations v. Morris,* 483 F.2d 577, 584 (5 Cir. 1973); *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342 (5 Cir. 1980), *reh. den.* 615 F.2d 919 (5 Cir. 1980).

[40] *Herb's Welding v. Gray,* 470 U.S. 414, 105 S.Ct. 1421, 84 L.Ed 2d 406 (1985).

> **Nothing contained in Subsection (b) of this section shall preclude enforcement according to its terms of any reciprocal indemnity provision whereby the employer of the person entitled to receive benefits under this chapter by virtue of Section 1333 of Title 43 and the vessel agree to defend and indemnify the other for cost or defense and loss or liability for damages arising out of or resulting from death or bodily injury to their employees.**

Section 905(c) of the LHWCA was part of a package of amendments offered in 1984 to clarify various aspects of the Act. As it originated in the Senate, as quoted by the conference report:

> " . . . The . . . bill provides an exemption to the Longshore Act's current proscription of indemnity agreements under Section 5(b) of the Act. That section is made applicable currently to situations on the outer-continental shelf by virtue of Section 4 of the Outer-continental Lands Act (43 U.S.C 1333). The bill would legalize those indemnity agreements insofar as they apply to the outer-continental shelf and ***would further preempt the application of state laws prohibiting such indemnity agreements.***"[41]

The clear preemption language did not survive the conference report. However, as described by the House-Senate conference committee:

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[41] H. R. Conference Report No. 1027, 98th Congress, Second Session, 1984, regarding P. L. 98-426, Longshore and Harbor Workers' Compensation Act amendment of 1984 (emphasis supplied).

> " . . . The conference substitute deals with the issues of overlapping and indirect liability and of exclusive remedy as follows:
>
> . . . The substitute removes the current proscription with respect to mutual indemnity agreements between employers and vessels as applied to the outer-continental shelf by virtue of the Outer-continental Shelf Lands Act."[42]

Significantly, the conference substitute did not change the language of the statute itself. Only the historical reference to a clear "preemption" was omitted from the description of the bill and the conference substitutes section versus the Senate-passed legislation.

In practice, of course, the statute as passed could operate in no other fashion, and the present case is a good example of why this is so. By its terms, § 905(c) is limited to the specific factual situations found here. As such, it is an effort to legislatively define the relationships between stevedore and vessel owner in no different fashion than the remainder of the Act.

Just as the enactment of § 905(b) in 1972 dispensed with the legal fiction in favor of stevedore employees[43] and the indemnity granted vessel owners[44] created by this Court, the passage of § 905(c) in 1984 clarified the OCSLA-based stevedore-vessel relationship. When Congress enacted this section, it was legislating in an area of

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[42] *Ibid.*

[43] *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946).

[44] *Ryan Stevedore & Co., Inc. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 76 S. Ct. 232, 100 L.Ed. 727 (1956).

specific federal interest. This section applies only in the event an injured worker claims negligence of a *vessel* caused his injury. The allegation of vessel negligence, which gives plaintiff a federal cause of action, creates the scenario under which this Section applies as a matter of federal maritime interest.

The outcome of such an action could arise only when at least one of the actors is engaged in traditional maritime commerce. Here, McDermott was engaged in maritime commerce, using its vessel in an offshore construction project for its customer.[45] McDermott's vessel was "in the admiralty" at the time of Wagner's accident, with § 905(b) status granted him by virtue of his employment in the construction effort in which McDermott, and its entire crew, was engaged.

It is of little but academic interest, then, that McDermott did not classify itself as a "vessel owner" for purposes of its contract. The contract with Landry was broad enough to encompass both land-based and maritime work. But when the fact situation fits as closely as it does in § 905(c), courts which fail to give effect to the indemnity allowed by law to McDermott as a vessel owner under the guise of a *stricti juris* adherence to an artificial distinction in its contract cases, run dangerously close to disregarding the language of the statute at issue.

As this Court said only recently: "[I]n the absence of contrary indication, we assume that when a statute uses a

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[45] *Grubart*, supra, at p. 1051.

term, Congress intended it to have its established meaning."[46]

Taken to its logical conclusion, the Fifth Circuit says McDermott is not a "vessel owner" in this case because it did not say it was contracting with Landry Enterprises as a "vessel owner." This approach ignores the intent of the Act. Worse, it fosters, by its deference to State law, inconsistent results affecting maritime commerce.[47]

In fact, the language of § 905(c) provides support for the proposition the Congress intended to preempt state laws which would otherwise apply through OCSLA to control contracts not meeting the strict definition of "maritime contracts." The statute recognizes that a worker employed on the Outer Continental Shelf will oftentimes gain remedies incident to the admiralty, such as specifically enumerated by § 905(b). Such a worker who obtains his status through the OCSLA often has collateral state law remedies which he can assert.[48]

The interplay between OCSLA and the admiralty can frequently create confusing questions over choices of law. By passing such a statute, Congress, it may be inferred,

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[46] *McDermott Intern., Inc. v. Wilander*, 111 S.Ct. 807, 498 U.S. 337, 112 L.Ed.2d 866 (1991).

[47] The effect on this commerce is substantial. Vessel insurance coverage, for example, is placed with the maritime law in mind. An indemnity in favor of a shipowner can result in a diminution in the premium charged; the converse is also true. And the ability to insulate oneself from liability is a cost savings evident to everyone.

[48] *See, e.g., Coody v. Exxon Corporation*, 630 F.Supp. 202 (M.D. La. 1986).

intended to clarify the confusion which would otherwise result in "mixed" or innominate contracts performed in maritime commerce.

Workers who are specifically employed to work on platforms are often required to be transiently on vessels, and frequently acquire maritime rights. Once those rights are acquired, it logically follows that Congress intended those rights to be adjudicated in accordance with the federal maritime law as they had traditionally done before the ratification of judge-made law by specific amendment (*Sieracki, Ryan,* etc.). Reciprocal indemnity agreements have always been enforceable in the admiralty. Their specific inclusion in Section 5(c), which is, in turn, applicable only to maritime claims brought under 5(b), is of the same ilk.

The whole of the statute at issue, and the intent of the LHWCA as a consistent scheme of recovery for maritime workers, leaves no room for doubt that the statute was to have preemptive effect.

The adoption of § 905(c) then, is merely a statutory recognition by the Congress that the § 905(b) remedy provided to an OCSLA-adoption longshoreman is intended to be pursued as a maritime remedy, and that any incidental employment agreement is likewise so construed. To do otherwise would be to defeat the purpose of the Act, and disrupt maritime commerce.

The question may not be whether State law is preempted, but whether it applies in the first place. Absent the remedy granted him by federal law, Wagner would have no claim at all. Since federal law applies to the controversy Wagner began by his lawsuit in Federal

court, and because the relationship defined by the contract is controlled by federal law, OCSLA, if anything, mandates enforcement of the reciprocal indemnity agreement.

This is true even though the contract in question may have other land-based applications which would not command the same result. If Wagner were employed on shore, there would be no question federal law would apply to grant him any right of action against McDermott, nor to control the indemnity arrangements such a lawsuit would trigger. Yet those same parties may enter into other arrangements allowed by a contract flexible enough to foster a variety of employment opportunities that would lead to the applicability of federal law. The remedy follows the jurisdiction.

INCONSISTENCY IN THE CIRCUIT COURT

The panel decision in this case is also at odds with earlier Fifth Circuit precedent.[49] But, whereas in *Campbell* the Fifth Circuit found a vessel owner entitled to enforce its indemnity, relying on a traditional maritime commerce analysis even before this Court's *Grubart* decision, the panel opinion in this case did not. And although this panel seems to believe the failure to include McDermott's status as "vessel owner" in the contract at issue is dispositive of its right of enforcement, another panel of the

[49] *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115 (5th Cir. 1992); *Lewis v. Glendel Drilling Co.*, 898 F.2d 1083 (5th Cir. 1990).

circuit court found the total circumstances of the subject contract more relevant in a factually indistinguishable case.

Campbell was a maritime worker employed to install a well casing, essentially a vertical pipeline driven into the seabed of the Outer Continental Shelf. His work station was a jack-up drilling barge, traditionally considered a vessel in the opinion of this Court and of the Fifth Circuit.[50] He was injured in a pure maritime fashion, namely in a transfer from his jack-up barge workstation to a crewboat.

Like Wagner, Campbell claimed longshoreman status. His lawsuit invoked obligations against each of the subject vessel owners under § 905(b). As here, those with whom his employer had contracted sought to enforce an indemnity agreement, and, as here, the employer characterized the contract as non-maritime because the work being done by Campbell, was asserted to be so.

The Fifth Circuit disagreed with that assessment. Its description (and approval) of the District Court's analysis is particularly instructive:

> "All six of the Davis factors[51] support our finding that the contract was maritime. (1) The work contract between UTP [the well owner] and Frank's [Campbell's employer] called for Frank's to deliver pipe and a hammer crew to the Taurus [the jack-up], a vessel, to drive pipe into the sea floor. (2) The actual work . . .

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[50] *Offshore Co. v. Robinson*, 266 F.2d 769 (5th Cir. 1959).

[51] *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313 (5th Cir. 1990)

> involved the driving or 'hammering' of pipe into the sea floor, the welding of the next length of pipe to that already driven, and continued driving. (3) The work took place on a vessel . . . in navigable waters. (4) The labor the Frank's crew performed using . . . the vessel was 'inextricably intertwined' with the mission of the Taurus. . . . (5) The principal work of the injured party, Campbell was welding which was also necessary for Frank's to complete its task. (6) Finally, Campbell was allegedly injured when attempting to board the Taurus in rough seas from the in-feed Trudy Bruce [the crew boat]. (Bracketed material supplied.)

The reasoning of this panel is thus the same as McDermott's. The construction project on the platform of which Wagner was a part could not have been performed without the use of a vessel, the DB 51. The actual work in constructing the platform was maritime commerce. The work Wagner was doing was "inextricably intertwined" with the mission of the DB 51. Wagner was injured on the vessel, allegedly through vessel negligence or unseaworthiness.

McDermott is in a position, then, which cannot be distinguished from the vessel owner in the cited case. While the contract between Landry and McDermott does not say in bold, black letters that McDermott is a "vessel owner," nothing in this case gives rise to any other configuration of the parties. Wagner had no case against McDermott other than under § 905(b), the Jones Act, or the general maritime law, none of which existed absent McDermott's status as vessel owner. Since Wagner was

found not to be a seaman, his only claim arises by virtue of his status as a longshoreman.

The *Campbell* panel had no difficulty following this Court's guidance:

> "The Supreme Court has stated that, when interpreting statutory provisions, '[o]ur task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.' The plain language of § 905(c) requires reciprocity between vessels and employers wishing to enter into agreement to indemnify . . . "[52]

The plain language of that section either applied because of Wagner's status through the OCSLA extension, or as a matter of Federal Maritime law.

In the *Glendel* case, the ultimate result supported a finding the subject contract was maritime even though it did not mention the word "vessel." But along the way, Judge Jones, one of the more respected admiralty minds on the circuit court, recognized the inconsistency in then-existing circuit court precedent, inconsistencies that have yet to be resolved six years later:

> How to resolve these inconsistencies is perplexing. What appears to us as a serious legal conundrum may have had little effect in the real world. That is to say, oil companies, drilling contractors and oil field service companies,

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[52] *Campbell*, supra at page 1125, citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570; 102 S.Ct. 3245, 3250; 73 L.Ed.2d 973 (1982).

> together with their insurers, may already have adjusted to the overlapping applications of maritime and state law by choice of law clauses or adjustments in the rates of coverage. We should not lightly 'straighten out' the formal logic of the law where to do so would upset stable commercial expectations. Moreover, for purposes of interpreting the reach of federal maritime law, the relative importance that one attaches to the use of 'vessels' in offshore oil exploration and traditional maritime concerns, the impact of potential harm to maritime commerce, and the need for uniformity are matters that have not been settled by the Supreme Court or our court.

This case radiates with the uncertainties that exist in this area of the law. Although it is technically resolved by application of settled authority, the persuasiveness of that authority is much in doubt.[53]

CONCLUSION

If there was any question in 1990 about this Court's belief in the importance of uniformity in maritime law due to its effect on the national economy, that doubt has been resolved.

Consistent with its policy choice requiring uniformity, this Court should recognize the enforceability of the reciprocal indemnity agreement here. It is folly to say this agreement was not "vessel related" when the lawsuit would never have been filed in federal court had the

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[53] *Glendel, supra,* at p. 1087.

accident occurred on land. This maritime claim should be governed by substantive federal law. If it is, McDermott is entitled to the indemnity for which it contracted.

The Application should be granted and the Circuit Court reversed summarily. In the alternative, the matter should be set down for full briefing and argument.

Respectfully submitted,

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Attorneys for Petitioner, McDermott, Inc.

Mark WAGNER, Plaintiff,

v.

McDERMOTT, INC., Defendant-Third-Party-Plaintiff-Appellant,

v.

CAPITAL WELDING & FABRICATION, INC.; Landry Enterprises, Inc. of Morgan City; Commercial Union Insurance Co.; Storebrand Insurance Co., U.K. Ltd., Third Party Defendants-Appellees,

and

Storebrand International U.K. Ltd.; Aetna Casualty & Surety Co., Third Party Defendants.

No. 95-30163.

United States Court of Appeals,
Fifth Circuit.

March 29, 1996.

Appeal from the United States District Court for the Western District of Louisiana.

Before REYNALDO G. GARZA, JOLLY and DUHE, Circuit Judges.

DUHE, Circuit Judge:

McDermott, appellant/third-party plaintiff, appeals from a judgment dismissing its third-party claims for contractual indemnity against Appellees. The district court in a cogent and well reasoned opinion entered judgment against McDermott because its claims are

barred by the Louisiana Oilfield Indemnity Act.[1] *Wagner v. McDermott, Inc.*, 899 F.Supp. 1551 (W.D.La.1994). We affirm.

BACKGROUND

McDermott was hired to construct an offshore platform located on the outer Continental Shelf. McDermott hired Capital Welding & Fabrication, Inc. (Capital) to do welding on the platform. Capital dispatched welders on loan from Landry Enterprises, Inc. (Landry) to the worksite. McDermott provided a barge on which the welders were housed and fed. Mark Wagner, one of the Capital/Landry welders, sued McDermott under the Jones Act,[2] general maritime law and § 905(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA)[3] after he slipped and fell aboard the barge. The district court

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[1] The Louisiana Act provides in pertinent part:

> Any provision contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water, or drilling for minerals . . . is void and unenforceable to the extent that it purports to or does provide for defense or indemnity, or either, to the indemnitee against loss or liability for damages arising out of or resulting from death or bodily injury to persons, which is caused by or results from the sole or concurrent negligence or fault (strict liability) of the indemnitee, or an agent, employee, or an independent contractor who is directly responsible to the indemnitee. La.R.S. § 9:2780(B) (1991).

[2] 46 U.S.C. § 688 (1975).

[3] 33 U.S.C. § 901 (1986).

found that Wagner was not a seaman and Wagner settled his claims.

During the litigation with Wagner, McDermott filed third-party claims against Capital and Landry (and their insurers) seeking indemnity under their nearly identical contracts with McDermott. The district court ruled that McDermott's claims are barred by the Louisiana Act because the McDermott-Capital/Landry contract is not maritime and § 905(c) of the LHWCA does not apply to McDermott's contractual claims. The district court also found that state law applies even if § 905(c) applies because the Louisiana Act is not inconsistent with § 905(c).

DISCUSSION

The parties do not dispute that if Louisiana law applies to McDermott's claims, the claims are barred under the Louisiana Act. McDermott argues that maritime law, which enforces indemnity provisions barred by the Louisiana Act, governs the dispute because its contract with Capital/Landry is a maritime contract.[4] We adopt Judge Doherty's thorough analysis and holding that the contract is non-maritime in nature. *Wagner,* 899

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[4] McDermott's first contention on appeal is that neither the district court nor this Court need address the applicability of maritime law to the McDermott-Capital/Landry contract because the indemnity provisions are enforceable under § 905(c) of the LHWCA alone. Because maritime law enforces indemnity provisions, addressing the applicability of maritime law to a contract as a threshold inquiry is logical, efficient and certainly not error.

F.Supp. at 1554-55 ("Nature of the Contract"). Since the contract is non-maritime, maritime law does not apply. *Hollier v. Union Texas Petroleum Corp.*, 972 F.2d 662 (5th Cir.1992).

McDermott contends that § 905(c) of the LHWCA governs the dispute to the exclusion of state law. Appellees, on the other hand, argue that Louisiana law applies either as the law of the adjacent state by default, or through the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1333 (1986), which incorporates state law as surrogate federal law if state law is not inconsistent with applicable federal law. If the OCSLA does not apply, Louisiana law governs the dispute. See *Domingue v. Ocean Drilling and Exploration Co.*, 923 F.2d 393 (5th Cir.1991). But as the district court points out, authority exists for both the applicability and non-applicability of the OCSLA to this dispute. *Wagner*, 899 F.Supp. at 1556. Like the district court, we do not decide whether the OCSLA applies. We assume without deciding that the OCSLA applies and makes the LHWCA applicable to Wagner's claim. The LHWCA is a workers' compensation scheme for certain workers engaged in maritime employment. Additionally, LHWCA coverage extends to workers engaged in the production of natural resources on the outer Continental Shelf through § 1333(b) of the OCSLA. We hold, however, that the McDermott-Capital/Landry contract is not governed by § 905(c) of the LHWCA.

The LHWCA codifies a negligence cause of action in favor of covered workers against a negligent vessel that causes injury. 33 U.S.C. § 905(b) (1986). When a non-OCSLA worker brings an action for vessel negligence, any indemnity agreements between the worker's

employer and the vessel in favor of the vessel are void. *Id.* If the plaintiff is an OCSLA worker, the proscription of 905(b) is removed to the extent that the indemnity provisions are reciprocal and are between the employer and a vessel.[5] 33 U.S.C. § 905(c) (1986).

Both the 905(b) proscription and 905(c) exception to the proscription apply by their very terms only to agreements between employers and vessels. The LHWCA defines "vessel" as the actual vessel and its "owner, owner pro hac vice, agent, operator, charter[er] or bare boat charterer, master, officer, or crew member." 33 U.S.C. § 902(21). Here, Wagner was injured on a vessel owned by McDermott. Therefore, McDermott argues, its contract is enforceable under § 905(c) because McDermott is a vessel as defined by the LHWCA and has a reciprocal indemnity agreement with Wagner's employer.

This Circuit has clearly stated, however, that neither 905(b) nor 905(c) proscribe non-vessel related indemnity agreements. *Knapp v. Chevron USA, Inc.*, 781 F.2d 1123 (5th Cir.1986); *Doucet v. Gulf Oil Corp.*, 783 F.2d 518 (5th Cir.1986). In *Knapp*, an employee of a contractor sustained injuries when he fell from a safety net attached to an

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[5] Section 905(c) states in pertinent part:

> Nothing contained in subsection (b) of this section shall preclude the enforcement according to its terms of any reciprocal indemnity provision whereby the employer of a person entitled to receive benefits under this chapter by virtue of section 1333 of Title 43 and the vessel agree to defend and indemnify the other for cost of defense and loss or liability for damages arising out of or resulting from death or bodily injury to their employees.

offshore platform. The employee sued the platform owner who filed a third-party claim for contractual indemnity against the contractor. The platform owner prevailed in the trial court but lost on appeal because the indemnity agreement was void under the Louisiana Act. The court explained:

> Neither the 1972 amendments adding § 5(b) nor the 1984 amendments adding § 5(c) to the LHWCA proscribe non-vessel related indemnity agreements. The distinction between vessels and non-vessels is well-established. We will not impute to congressional silence a desire to apply the 1984 LHWCA amendments to non-vessels. Nor are we persuaded that these amendments preempt the field.

Knapp, 781 F.2d at 1131 (citations omitted).

Similarly in *Doucet*, a roustabout was injured on an offshore platform. The platform owner filed third-party claims for contractual indemnity against the roustabout's employer. The Court again found that the indemnity claim was barred by the Louisiana Act.

> The Compensation Act [LHWCA] neither expressly permits nor forbids contractual indemnity agreements between non-vessels and compensation-paying employers. This silence is a gap in federal law that, according to the Shelf Lands Act, is to be "filled" by state law governing such indemnity contracts.

Doucet, 783 F.2d at 525 (citations omitted).[6]

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[6] *See also Heath v. Superior Oil Co.*, 617 F.Supp. 33 (W.D.La.1985) and *Rigby v. Tenneco Oil Co.*, 607 F.Supp. 1247 (E.D.La.1985).

We recognize that neither *Knapp* nor *Doucet* involves a vessel nor a 905(b) claim as this incident does. Nevertheless, McDermott's claims are treated the same because McDermott contracted with Capital/Landry in its capacity as contractor, not as vessel owner, the same position as the relevant parties in *Knapp* and *Doucet*.

We interpret the § 905(c) requirement of an indemnity contract between "the employer . . . and the vessel . . . " to require that the contracting entity must be contracting in its capacity as the vessel, not as a party who incidentally utilizes a vessel in other operations. Here, McDermott entered into a contract for welders to work on a fixed platform it was constructing. McDermott was not acting in its capacity as vessel owner but only as a contractor who incidentally utilized a vessel to accomplish its work. The fact that McDermott happens to own the vessel does not place the contract within § 905(c) McDermott argues that because Plaintiff asserted a § 905(b) claim, § 905(c) must govern the contract dispute. While § 905(b) liability is a requisite for § 905(c) applicability, the contract must be of the type covered by § 905(c). It must be with a vessel. The McDermott-Capital/Landry contract is not.

Having held that the McDermott-Capital/Landry contract is not governed by § 905(c), we need not determine whether the Louisiana Act is inconsistent with § 905(c). The indemnity provisions of the McDermott-

Capital/Landry contract are governed by state law and are barred by the Louisiana Oilfield Indemnity Act.[7]

AFFIRMED.

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[7] Commercial Union Insurance Company, Capital's maritime employer's liability insurer, argues that McDermott's appeal as to Commercial Union is frivolous because its policy does not afford coverage for Wagner, an employee of Landry. Commercial Union does not ask for affirmative relief but merely urges affirmance. Because we affirm the dismissal of McDermott's claims, Commercial Union's alternate argument for dismissal is moot.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

MARK WAGNER	CIVIL ACTION NUMBER: 93-0715
VERSUS	
MCDERMOTT, INC.	JUDGE DOHERTY
	MAGISTRATE JUDGE TYNES

FINAL JUDGMENT

(Filed Jan. 30, 1995)

This action came on for trial before the Court, Honorable Rebecca F. Doherty, District Judge, presiding. After due consideration of the motions, briefs, evidence and argument of counsel, the Court in the above entitled matter, on December 19, 1994, filed an order and reasons for judgment on the merits, holding that McDermott, Inc.'s claims should be dismissed at McDermott's costs. Based upon those findings and conclusions and further argument of counsel, the Court on January 19, 1995 denied McDermott's motion styled as a Motion to Amend Findings of Fact and Judgment Pursuant to Rule 52(b) and Motion for New Trial Pursuant to Rule 59, but considered by this Court as Motion for Reconsideration of the Court's Reasons for Judgment, except to alter the findings of fact as reflected in the minute entry of January 23, 1995. The issues having been duly tried and a decision having been rendered, the Court herewith enters its final judgment herein:

IT IS ORDERED, ADJUDGED AND DECREED that all cross-claims and third-party complaints of McDermott, Inc. as against Capital Welding & Fabrication, Inc., Landry Enterprises, Inc., Commercial Union Insurance Company, and Storebrand Insurance Company U.K., Ltd. be and same are hereby DISMISSED with prejudice, costs to be born by McDermott, Inc.

THUS DONE AND SIGNED this 26 day of January, 1995.

/s/ Rebecca F. Doherty
REBECCA F. DOHERTY
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

MARK WAGNER	CIVIL ACTION NUMBER: 93-0715
VERSUS	JUDGE DOHERTY
MCDERMOTT, INC., ET AL	MAGISTRATE JUDGE METHVIN

REASONS FOR JUDGMENT

(Filed Dec. 19, 1994)

Background

Mark Wagner was employed by Landry Enterprises, Inc. ("Landry") as a welder. At the time of Wagner's accident, Landry loaned Wagner out to Capital Welding & Fabrication, Inc. ("Capital"), who had a Blanket Subcontractor's Agreement with McDermott, Inc. McDermott made a "call out" under this agreement to Capital for laborers to perform welding on a McDermott offshore platform. This Court assumes that because there was no place to sleep or eat on the platform, Wagner slept and ate his meals on a McDermott derrick barge which was adjacent to the platform. No specific reference to this housing arrangement was made in either the Blanket Subcontractor's Agreement or the call out.[1] Wagner allegedly suffered injuries when he slipped and fell on

[1] There is a question of fact as to whether the call out was to the platform or the barge; however, neither the Blanket Subcontractor Agreement nor the call out referenced the fact that the barge would be used to house the workers.

the deck of the barge as he was headed to its restroom facilities.

Wagner filed suit against McDermott, Landry, and/or Capital all under the Jones Act. He also filed an unseaworthiness claim against McDermott as vessel owner alleging he was a seaman. In the alternative, Wagner asserted a 905(b) claim under the Longshore & Harbor Workers' Compensation Act against McDermott as owner of the vessel for vessel negligence. Finally, he asserted in the alternative a general maritime law claim against McDermott as vessel owner. By third party complaint, McDermott filed suit against Capital, Capital's insurers, Storebrand Insurance Company U.K. Ltd. ("Storebrand") and Commercial Union Insurance Company ("Commercial Union"), and Landry pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201. McDermott seeks a judgment declaring that it is entitled to contractual defense and indemnity under the terms of the "Blanket Subcontractor's Agreement" between it and Capital and/or Landry.

Capital, Landry, and Storebrand filed motions for summary judgment seeking dismissal of plaintiff's claims based on his status as a seaman. The Court granted those motions upon finding that Wagner was not a seaman. (Memorandum Ruling, October 18, 1994). Capital, Landry, Storebrand, Commercial Union, and McDermott filed motions for summary judgment as to McDermott's contractual claim. The Court was informed that the primary injury claim settled, so that only the contractual claims asserted by McDermott remain. The Court denied the remaining outstanding motions for summary judgment as to McDermott's contractual claim, and the

remaining parties jointly moved the Court for a final ruling on the merits based upon the evidence and briefs submitted. The Court finds that it has jurisdiction over McDermott's contractual claim under its supplemental jurisdiction, 28 U.S.C. § 1367, and under its admiralty jurisdiction, 28 U.S.C. § 1333.

Thus, this Court's judgment concerns only the contractual claims McDermott has asserted against Landry, Capital, Commercial Union, and Storebrand. The issues before this Court present a unique and legally interesting question which this Court has not found to have been fully addressed by any court.

McDermott's Contractual Claims for Defense and Indemnity

McDermott argues that the "Blanket Subcontractor's Agreement" it executed with Capital and/or Landry[2] is maritime in nature or is governed by the LHWCA in its entirety. McDermott maintains that in neither case does Louisiana law apply to void the indemnity provision contained in the contract. McDermott asserts that "the clearest reason McDermott is entitled to indemnity for which it contracted is found in a clear reading of § 905(c) of the LHWCA along with the contract at issue in this case." (McDermott's trial outline, p. 5) Section 905(c) provides in pertinent part:

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[2] McDermott executed identical "Blanket Subcontractor's Agreements" with Capital and Landry. McDermott asserts that the call out was made to Capital; however, the Court finds for the reasons given *infra* that Wagner was Landry's employee.

(c) Outer Continental Shelf

> In the event that the negligence of a vessel causes injury to a person entitled to receive benefits under this Chapter by virtue of section 1333 of Title 43 [the OCSLA], then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel in accordance with the provisions of subsection (b) of this section. Nothing contained in subsection (b) of this section shall preclude the enforcement according to its terms of any reciprocal indemnity provision whereby the employer of a person entitled to receive benefits under this chapter by virtue of section 1333 of Title 43 and the vessel agree to defend and indemnify the other for cost of defense and loss or liability for damages arising out of or resulting from death or bodily injury to their employees.

Capital, Landry, Storebrand, and Commercial Union argue that the blanket subcontractor's agreement is a non-maritime contract and that the Louisiana Oilfield Indemnity Act (LOIA)[3] applies by way of the non-

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[3] The LOIA provides in pertinent part:

> Any provision contained in collateral to, or affecting an agreement pertaining to a well for oil, gas, or water, or drilling for minerals . . . is void and unenforceable to the extent that it purports to or does provide for defense or indemnity, or either, to the indemnitee against loss or liability for damages arising out of or resulting from death or bodily injury to persons, which is caused by or results from the sole or concurrent negligence or fault (strict liability) of the indemnitee, or an agent, employee, or an independent contractor who is directly responsible to the indemnitee. La. R.S. § 9:2780(B)

maritime contract which is governed by Louisiana law as the land based law applicable to the non-maritime contract or by way of the Outer Continental Shelf Lands Act.[4] They argue further that the LOIA invalidates the indemnity provision at issue.

The indemnity provision in the contract provides:

> VIII. A. Subcontractor shall protect, defend, indemnify and hold harmless McDermott, its employees, officers and agents, against all claims, demands or causes of action by Subcontractor, Subcontractor's employees, officers or agents or their successors-in-interest for personal injury or death or property damage or destruction arising out of or in any way related to the performance by Subcontractor of any work covered hereby or by the failure of Subcontractor so to perform, howsoever such personal injury or death or property damage or destruction is caused, including the sole or concurrent fault or negligence of McDermott, its employees, officers or agents and/or the unseaworthiness of vessels which are owned,

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[4] The OCSLA provides in pertinent part:

> To the extent that they are applicable and not inconsistent with this act or with other federal laws and regulations of the secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent state now in effect or hereafter adopted, amended or repealed are hereby declared to be the law of the United States for that portion of the subsoil and seabed, the outer continental shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the state if its boundaries were extended seaward to the outer margin of the outer continental shelf. 43 U.S.C. Section 1333(A).

operated or chartered by McDermott regardless of whether said unseaworthiness pre-existed the execution of the Agreement.

B. McDermott shall protect, defend, indemnify and hold harmless Subcontractor, its employees, officers and agents against all claims, demands or causes of action by McDermott, McDermott's employees, officers or agents or their successors-in-interest for personal injury or death or property damage or destruction arising out of or in any way related to the performance of the work covered hereby or by the failure to perform same, howsoever such personal injury or death or property damage is caused, including the sole or concurrent fault or negligence of Subcontractor, its employees, officers or agents and/or the unseaworthiness of the vessels which are owned or operated or chartered by Subcontractor regardless of whether said unseaworthiness pre-existed the execution of this Agreement.

Nature of the Contract

McDermott first argues that the contract under which it claims indemnity is a maritime contract and under maritime law, the indemnity provision is valid. In determining whether a contract is maritime, a court should consider several factors as outlined by the Fifth Circuit in *Davis and Sons, Inc. v. Gulf Oil Corporation,* 919 F.2d 313 (5th Cir. 1990), *reh'g denied,* 924 F.2d 1054 (1991) and its progeny. *See also Domingue v. Ocean Drilling and Exploration Company,* 923 F.2d 393 (5th Cir.) *reh'g denied,* 940 F.2d 117 (1991), *cert. denied,* 112 S.Ct. 874 (1992); *Hollier v. Union Texas Petroleum Corporation,* 972 F.2d 662 (5th Cir.

1992); *Dupre v. Penrod Drilling Corporation,* 993 F.2d 474 (5th Cir. 1993). Those factors include:

> 1. What does the specific work order in effect at the time of the injury provide?
>
> 2. What work did the crew assigned under the work order actually do?
>
> 3. Was the crew assigned to work aboard a vessel in navigable waters?
>
> 4. To what extent did the work being done relate to the mission of that vessel?
>
> 5. What was the principal work of the injured worker?
>
> 6. What work was the injured worker actually doing at the time of injury?

Davis, 919 F.2d at 316.

As in *Davis* and *Domingue,* the contract at issue in the instant case is a "blanket service" contract which was followed by later work orders. The first paragraph of the blanket subcontractor's agreement provides:

> I. This Blanket Subcontractor's Agreement sets forth the terms and conditions on which work or services (herein called "work") will be performed by Subcontractor for McDermott from time to time during the effective period hereof, and the provisions hereof shall apply to all work so performed by Subcontractor, regardless of the location therefore, and regardless of whether such work relates to McDermott's property or constitutes work which McDermott is obligated to perform for a third party and sublets to Subcontractor, and regardless of whether such work is covered by a written purchase order or other written instrument or contract (all of which are

> herein sometimes called "Specific Contract Documents") signed by an officer of McDermott, Inc., provided that a provision in any Specific Contract Document shall prevail over a conflicting provision in this Blanket Subcontractor's Agreement. However, it is understood that this Blanket Subcontractor's Agreement shall apply to work performed by Subcontractor upon verbal request of a representative of McDermott, without the execution of delivery of any Specific Contract Document.

Therefore, this Court "must interpret [the blanket contract and the later work orders] together in evaluating whether maritime or land law is applicable to the interpretation and enforceability of the contract's provisions." *Id.* at 315.

Factor (1) The Specific Work Order. The specific work order requesting Wagner for welding services was in the form of a verbal request or "call out." The Court cannot find any written evidence or documentation of the actual "call out." McDermott asserts that it "called out" a group of welders from Capital to go out to the McDermott **derrick barge,** DB-51. However, Capital and Landry assert that the request was for welders to work on a McDermott **offshore platform.** The plaintiff states in his deposition that his **work station was on the platform.** Under either version of the "call out," Wagner actually performed welding services on the platform.[5]

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[5] There is documentation of Wagner's work with McDermott in the form of McDermott "daily job reports" and "daily time tickets." They reference both the DB-51 and the platform location.

Factor (2) The Actual Work Performed. It is undisputed that Wagner and the other welders called out on this job performed only welding services and only on the McDermott offshore platform.

Factor (3) Aboard A Vessel. There is no evidence that the crew called out by McDermott was assigned to work aboard the derrick barge. Moreover, the undisputed facts show that the welders worked exclusively on the platform. The Court has ruled previously in this case that Wagner was not permanently assigned to the DB-51.[6]

Factor (4) Relationship of the Work to the Mission of the Vessel. As most recently stated by the Fifth Circuit a "contract related to oil and gas exploration and drilling takes on a salty flavor when the performance of the contract is more than incidentally related to the execution of the vessel's mission." *Dupre v. Penrod Drilling Corp.*, 993 F.2d 474, 477 (5th Cir. 1993) (citing *Domingue*, 923 F.2d at 396; *Theriot v. Bay Drilling Corporation*, 783 F.2d 527, 538 (5th Cir. 1986)). The Fifth Circuit has also stated that a contract is maritime when the "contract did not merely touch incidentally on a vessel but specifically focused on the use of a vessel to [perform the work]." *Id.* In the instant case, the contract, consisting of the work order and the blanket subcontractor's agreement, did not specifically require nor specifically address the supply and use of a vessel for performance of the welding services, rather it required Landry or Capital to provide welders

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[6] The Court further finds in reviewing the evidence that the work order did not reference or require McDermott to provide a vessel to house the welders during Wagner's work shift.

who worked exclusively on a platform. No specific mention of the use of the vessel where the alleged accident occurred was made in either the Blanket Subcontractor's Agreement or call out.

Factor (5). Principal Work. The principal work of Wagner was welding aboard the McDermott platform as previously described.

Factor (6). Work at the time of injury. Wagner was not performing any work pursuant to the contract at the time of his injury, but slipped and fell in the washroom facilities of the barge at the time of his injury. Thus, this factor has little relevance in characterizing the nature of the contract. *See Dupre,* 993 F.2d at 478; *Domingue,* 923 F.2d at 398.

After applying the *Davis* factors to the blanket subcontractor's agreement and later verbal work order, this Court finds that the contract is non-maritime.

Consequences of a Non-Maritime Contract

Capital, Landry, Storebrand, and Commercial Union assert that the contract between Capital and/or Landry is a non-maritime contract and that the LOIA applies by way of the land based law applicable to the contract or by way of the OCSLA, resulting in the invalidation of the indemnity provision. This Court notes that the applicability of the OCSLA or 905(c) to the instant case is problematic; however, this Court believes for reasons given below that the LOIA does apply to the contract. This Court further notes that the Fifth Circuit has held that the LOIA applies when the contract is non-maritime,

even when the plaintiff is injured on a vessel (a non-OCSLA situs).[7]

For example, in *Domingue v. Ocean Drilling and Exploration Company*, 923 F.2d 393, 398 (5th Cir. 1991), the court held that a blanket service contract followed by an oral work order requesting wireline services on a jackup drilling rig was a non-maritime contract. The plaintiff suffered injuries when he tripped and fell over a piece of equipment located on the deck of the rig. After applying the *Davis* factors, the court held the service contract was non-maritime. It then stated, "Accordingly, LOIA controls to invalidate the indemnity provision of the blanket contract." *Id.* at 398. Therefore, under *Domingue*, arguably, the indemnity provision involved in the instant case is invalid because land based law, here Louisiana law, applies to the non-maritime contract even if as in the case before this Court, the injury occurs on a vessel.

However, the Fifth Circuit has also applied the LOIA as surrogate federal law under the OCSLA when the OCSLA applies. For instance, in *Hollier v. Union Texas Petroleum Corp.*, 972 F.2d 662 (5th Cir. 1992), the Fifth Circuit held that Louisiana law applied and, therefore, the LOIA applied through the OCSLA. In that case, the plaintiff was killed while transferring from a "stationary jackup vessel" to a well platform. As in the instant case, the primary injury claim settled, so that only the contractual indemnity claims were before the court. The court

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[7] *Domingue v. Ocean Drilling & Exploration Co.*, 923 F.2d 393, 398 (5th Cir. 1991).

outlined the following test to determine whether to apply the LOIA as surrogate federal law under the OCSLA:

> "1. The controversy must arise on a situs covered by OCSLA (i.e. the subsoil, seabed, or artificial structures permanently or temporarily attached thereto).
>
> 2. Federal maritime law must not apply of its own force.
>
> 3. The state law must not be inconsistent with federal law."

Id. at 665 (citing *Smith v. Penrod Drilling Corporation*, 960 F.2d 456, 459 (5th Cir. 1992)).

Under the first factor, the *Hollier* court analyzed "the controversy" to be defined by where the plaintiff's accident occurred. The Court determined that the plaintiff was in physical contact with the platform at the time of injury, thus, the first factor was met. In the case before this Court, Wagner was injured on a vessel in navigable waters. Therefore, under an *Hollier* analysis, the "controversy" did not take place on an OCSLA situs. However, under *Union Texas Petroleum v. PLT Engineering*, 895 F.2d 1043,1047-48 (5th Cir.), *cert. denied*, 498 U.S. 848, 111 S.Ct. 1136 (1990), the situs requirement could be met when "the locations where the substantial work pursuant to the contract was done were covered situses. . . . " Thus, under *Union Texas*, the OCSLA situs factor is met in the instant case, as the work required by the contract was performed on an offshore platform. However, even if the OCSLA does not apply because the "controversy" took place on a vessel, nonetheless, under *Domingue*, Louisiana law would still apply because the contract at issue is a

non-maritime contract and therefore, governed by the applicable land based law.

The second factor under the *Hollier* analysis is met because federal maritime law does not apply to *the issue* at hand, i.e., the indemnity claims under a contract entered into between the parties. In particular, the contract is non-maritime. Under the third factor, the LOIA must not be inconsistent with federal law. Here, the very interesting issue of perspective becomes pivotal. If one frames the issue from McDermott's perspective, its potential liability flows from its role as vessel owner under the general maritime law or 905(b) – plaintiff alleges injury aboard the McDermott vessel and plaintiff is a longshoreman. Consequently, McDermott urges 905(c) also should apply because 905(c) is available federal law and allows reciprocal indemnity agreements between "vessels" and "employers." The application of Louisiana law and in particular the LOIA would prohibit the reciprocal indemnity agreements. If one views the issue from Landry, Capital, and its insurers' perspective, their potential liability as to McDermott's claims flows from the contract and work order entered into with McDermott in which Wagner was requested to perform and was performing welding services on a *platform*. Consequently, Landry/Capital argue the LOIA should apply because the contract to perform welding on a platform is non-maritime. Consequently, Louisiana law applies to govern the non-maritime contract or applies through the OCSLA as surrogate federal law.

Both sides make convincing arguments; however, *the claim which is at issue before this Court* is one for *contractual*

indemnity. The *contract was non-maritime* for welding services on a platform. Consequently, either land based law governs the contract[8] or the OCSLA which adopts Louisiana law as surrogate law governs the contract; under either theory, the LOIA would come into play. McDermott is asking Capital and/or Landry to indemnify it *pursuant to the contract for welding services on the platform* – that is the claim before the Court. The fact plaintiff "happened to be on a vessel" does not change the focus, particularly as neither said vessel nor its use was specifically referenced in the contract. The claim is made pursuant to the contract and the contract is non-maritime; the contract does not specifically reference either the vessel or its use, therefore, the contract is not for vessel services or for work on a vessel.

McDermott, nonetheless, pursues its argument by asserting that the LOIA is inconsistent with applicable federal law, i.e., 905(c). As the indemnity provisions in the contracts are reciprocal in nature, they are enforceable under the clear language of 905(c), and McDermott's **tort** liability arises either under 905(b) or the general maritime law. However, McDermott's **contractual** liability rests with a non-maritime contract. Consequently, the Court finds itself in the unfortunate situation of interpreting and applying 905(c) and its interplay with the LOIA when a longshoreman is injured on a vessel where he was housed, but was working on a platform under a verbal call out order of welding under a non-maritime contract which does not address either the vessel or the worker's

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[8] It is assumed said land based law is Louisiana as no evidence establishing any other state's law has been presented.

housing on the vessel. This factual situation presents an issue where there is little guidance, as the Fifth Circuit seldom has been faced with cases involving 905(c) of the LHWCA.

905(c)

The Court begins its analysis of 905(c) by first determining if 905(c) is applicable to McDermott's contractual claim, that is, whether the type of indemnity agreement permitted by 905(c) is present in the contract between McDermott and Capital and/or Landry. As Storebrand points out, 905(c) requires a reciprocal indemnity agreement between the employer and "**the vessel.**"[9] In

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[9] The Court notes that the LHWCA provides a definition for vessel under the Act:

> **Unless the context requires otherwise,** the term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bareboat charterer, master, officer, or crew member.

33 U.S.C. § 902(21).

This definition seems to concern the tort provisions of the LHWCA, as the definition revolves around the place of injury. The Court finds that the facts of this case triggers the clause, "unless the context requires otherwise," in searching for the intent of the parties to this contract. Therefore, the definition of vessel under the LHWCA need not be controlling in interpreting the contract at issue. If the Court were to do so, it would merge the contractual issues with the tort issues involved in this case.

reviewing the evidence and briefs submitted, the Court has concluded that the contract at issue is non-maritime. This Court also finds that what the parties intended by their contract was a contract between Capital and/or Landry as the employer, and McDermott, as **platform owner,** for welding services **on the platform** for the time period of Wagner's shift. In this case, Capital/Landry contracted with McDermott to perform welding services aboard a platform. The dual relationship between McDermott and Capital/Landry was therefore one involving an **employer and a platform owner.** The contract to provide welders could be fully complied with without a vessel and no reference to the use of the vessel to house the workers is made in the contract. McDermott interjected the vessel into the equation, *but not into **its contract.*** Nor was there a separate contract referencing the use of the vessel to house the workers and defining the intent of the parties as to the allocation of potential liability in the event of injury aboard the vessel.

The Court concedes that the general indemnity provision of the master service contract includes generic references to "unseaworthiness of vessels;" however, in the same way that the Court determined the nature of the contract by looking at the contract in conjunction with specific work orders, the Court interprets the applicability of an indemnity provision by looking to the intent of the parties shown in the blanket contract and later work order. McDermott had a master service contract to cover **all work** with all of its approved contractors.[10] However, the law accepts that it is the work order

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[10] *See supra* note 2.

which defines the actual work which was to be performed on any given job.[11] Here, Capital/Landry were to provide welders to work on a "McDermott platform."

This Court notes that the limited jurisprudence on 905(c) seems to create, in effect, a separate inquiry of effected contracts, those which are "vessel-related." In *Knapp v. Chevron U.S.A., Inc.*, 781 F.2d 1123 (5th Cir. 1986), the Fifth Circuit discussed 905(b) and 905(c) of the LHWCA as these provisions relate to the validity of indemnity agreements. The Court stated:

> Neither the 1972 amendments adding § 5(b) nor the 1984 amendments adding § 5(c) to the LHWCA proscribe non-vessel-related indemnity agreements. The distinction between vessels and non-vessels is well-established. . . . As [the LOIA] relates to non-vessel-related indemnity agreements, it is not inconsistent with "federal laws" and is enforceable.

Knapp, 781 F.2d at 1131. For the reasons given, this Court has determined that the contract at issue between McDermott and Capital/Landry was a **non-vessel-related indemnity agreement**; therefore, under the rationale of *Knapp, supra*, the LOIA applies to invalidate that indemnity provisions of the contract.

This Court is not unmindful that McDermott's potential liability to plaintiff is based in maritime law, or as McDermott argues, specifically under 905(b); however, this Court finds **that McDermott did not address this potential maritime liability *in its contracts* with Capital**

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[11] *See e.g.* cases cited under "Nature of Contract" section of this opinion.

and/or Landry. It did not contract for indemnification from the risk which befell Wagner. Had McDermott desired indemnity for claims arising out of the use of its vessel, it could have easily contracted for same in *its contract*. Had McDermott done so, the added indemnity provision would have been "vessel-related" and as such likely would have been valid under 905(c).

Is the LOIA Inconsistent with 905(c)?

However, even if this Court were to find 905(c) applicable to the McDermott contract, then the issue of whether the LOIA is inconsistent with 905(c) would arise. On this issue, McDermott directs the Court to *Lewis v. Diamond Services Corporation*, 637 So.2d 825 (La. App. 1st Cir.), *writ denied*, 643 So.2d 159 (1994) in which the court held that the LOIA was inconsistent with 905(c) of the LHWCA. The Court concedes that the facts of that case are very similar to the instant case; however, the reasoning behind the decision is at best unclear, and as this court is not sitting as an *Erie* Court, *Lewis* is not binding.

McDermott also directs the Court to *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115 (5th Cir.), *reh'g denied*, 979 F.2d 1115 (1992). In that case, the Fifth Circuit first determined the nature of the contract at issue, which is found to be **maritime.** The Court concluded:

> In sum, Campbell was injured while working as part of a crew contracted to travel upon and enable a special-purpose vessel to perform the function for which that vessel was designed. The vessel nature of the OFFSHORE TAURUS is therefore controlling in this case, and we find that the underlying contract between Frank's &

> UTP, a contract for services to enable the OFF-SHORE TAURUS to complete its mission, is maritime in nature.

Id. at 1124. The Court then discussed 905(b) and 905(c). As the Court stated, 905(b) provides in pertinent part:

> In the event of injury to a person covered under the chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.

The Court explained that 905(b) protects employers of those engaged in shore-based maritime employment from indemnity claims brought by vessels in instances where the negligence of vessels causes injuries to the maritime employees. *Id.* The Court explained further that 905(c) was an "exception to 905(b)'s proscription of indemnification for instances in which *employers* and *vessels* enter reciprocal agreements to defend and indemnify each other." *Id.* (emphasis added) Those are not the facts before this Court. The indemnity provision nor the contract referenced the use of the vessel to house the workers.

When the Court in *Campbell* turned to an application of 905(c), it was not concerned with whether the LOIA was inconsistent with 905(c), rather the actual issue in the case was whether the "reciprocity requirement" of 905(c)

was satisfied by the contract at issue in the case. Therefore, *Campbell* does not help this Court in determining whether the LOIA is inconsistent with 905(c). This Court does find significant, however, the fact that the *Campbell* court *first determined that the contract was maritime* and then turned to an application of 905(c). Here, the contract is *non-maritime;* therefore, maritime law would *not* apply to the contract.

The Court finds that the cases to which McDermott has directed the Court are not helpful in determining whether the LOIA is inconsistent with 905(c); therefore, an examination of the language of the statute itself is in order. It is difficult to determine whether the LOIA is inconsistent with 905(c) because of the language of 905(c):

> Nothing contained in subsection (b) of this section shall preclude the enforcement according to its terms of any reciprocal indemnity provision whereby the employer of a person entitled to receive benefits under this chapter by virtue of Section 1333 of Title 43 and the vessel agree to defend and indemnify the other for cost of defense and loss or liability for damages arising out of or resulting from death or bodily injury to their employees.

Does this mean that under federal law these agreements *shall be* enforceable, or that they may be enforceable depending on whether state law or maritime law controls the contract.[12]

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[12] Commercial Union argues that the "language simply prohibits 905(b) from invalidating such agreements and specifically leaves state law or other law that might invalidate

In various cases the Fifth Circuit has stated *in dicta* that 905(c) "**permits** certain indemnity agreements," *Knapp v. Chevron U.S.A., Inc.*, 781 F.2d 1123, 1131 (5th Cir. 1986), that 905(c) "**sanctions**" mutual indemnity provisions between vessel owner and employer, *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1231 (5th Cir. 1986), and that 905(c) "**removes § 905(b)'s proscription** to the extent that indemnity agreements between *vessels and employers* are reciprocal." *Doucet v. Gulf Oil Corp.*, 783 F.2d 518, 525 (5th Cir.), *reh'g denied*, 788 F.2d 250, *cert. denied*, 479 U.S. 883, 107 S.Ct. 272 (1986). In *Knapp*, the Fifth Circuit also stated, "as [the LOIA] relates to **non-vessel-related** indemnity agreements, it is not inconsistent with 'federal laws' and is enforceable." *Knapp*, 781 F.2d at 1131. In the context of *Knapp*, this statement leads this Court to conclude that as the LOIA relates to **vessel-related** indemnity agreements the LOIA is inconsistent with federal law. However, the contract at issue here is *not vessel-related*.

In sum, this Court finds that the type of indemnity provisions allowable under 905(c) are not present here, that the contract is non-maritime, is not vessel-related and that Louisiana law applies by virtue of its non-maritime nature or by virtue of the OCSLA. Therefore, McDermott is not entitled to defense or indemnity from Capital and/or Landry and/or its insurers. Further, this Court invites the parties to petition a higher court to give guidance on what the interplay of the law should be in a case with these unique facts, specifically what constitutes

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such arrangements in place." Supplemental Memorandum on 905(c), p. 4.

a vessel-related agreement and whether the LOIA is in fact inconsistent with 905(c).

McDermott's Alternative Arguments

McDermott argues that if Louisiana law applied to this contact, which this Court has found does apply, then the contract between it and Capital is void based on the fraud as outlined under Louisiana Civil Code arts. 1953 and 1955. McDermott contends that Landry and Capital engaged in the "suppression of the truth" about their relationship; *i.e.*, that Landry provided Capital contract employees which Capital then provided to McDermott under the contract. It further maintains that although fraud would vitiate the contract, McDermott's rights to all available insurance coverages would be preserved. McDermott claims that it is an "alternate employer" covered by the Commercial Union policy[13] and that it is a

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[13] Commercial Union, Capital's workers' compensation and employer liability insurer, asserts that McDermott is not entitled to defense and indemnity as an additional assured or an alternate employer on the Commercial Union policy. Commercial Union also pleads application of the LOIA. After reviewing the documents and exhibits, the Court finds Commercial Union's argument persuasive. As Commercial Union points out, the Blanket Subcontractor's Agreement does not require an endorsement so that McDermott is an additional assured on the workers' compensation and employer liability insurance policy. Commercial Union also asserts that it insures only Capital's employees and not Landry's employees; therefore, McDermott is not entitled to coverage under the "Alternate Employer" endorsement because Wagner was an employee of Landry. The Court has thoroughly reviewed the employment records and documents concerning Wagner's

named insured under the Storebrand policy of general liability.[14]

This Court need not rule on whether the Blanket Subcontractor's Agreement between McDermott and Capital was vitiated by fraud because even if this Court were to so find, such a result does not allow McDermott a back door method around the LOIA. The LOIA provides in paragraph G:

> G. Any provision in any agreement arising out of the operations, services, or activities listed in Subsection (c) . . . which requires waivers of subrogation, additional named insured endorsements, or *any other form of insurance protection which would frustrate or circumvent the prohibitions* of this Section, shall be null and void and of no force and effect.

La. R.S. 9:2780(G).

Thus, the LOIA invalidates McDermott's claims under the Storebrand and Commercial Union policies, as such claims would frustrate the prohibition of the LOIA. This Court finds the language of the LOIA as quoted above requires this Court to dismiss McDermott's contractual claims against Storebrand and Commercial Union.

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employment and finds that Wagner was an employee of Landry. Therefore, even if the LOIA does not invalidate McDermott's claims against Commercial Union, McDermott would still not be entitled to defense and indemnity from Commercial Union.

[14] Storebrand does not dispute that McDermott is an additional assured on its policy for comprehensive general liability insurance; however, it pleads the application of the LOIA.

Conclusion

Accordingly, for the reasons stated above, this Court DISMISSES McDermott's contractual claims asserted against Capital, Landry, Storebrand, and Commercial Union.

THUS DONE AND SIGNED in chambers this 19 day of December , 1994 at Lafayette, Louisiana.

/s/ Rebecca F. Doherty
REBECCA F. DOHERTY
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

MARK WAGNER	CIVIL ACTION NUMBER: 93-0715
VERSUS	JUDGE DOHERTY
MCDERMOTT, INC., ET AL	MAGISTRATE JUDGE METHVIN

ORDER

(Filed Dec. 19, 1994)

Considering the foregoing memorandum ruling;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that counsel are to submit a judgment agreed to by all parties reflecting this Court's ruling to the Court for signature on or before December 30, 1994.

Lafayette, Louisiana this 19 day December, 1994.

/s/ Rebecca F. Doherty
REBECCA F. DOHERTY
UNITED STATES
DISTRICT JUDGE

33 U.S.C. § 905. Exclusiveness of liability

* * *

(c) Outer Continental Shelf

In the even that the negligence of a vessel causes injury to a person entitled to receive benefits under this chapter by virtue of section 1333 of Title 43, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel in accordance with the provisions of subsection (b) of this section. Nothing contained in subsection (b) of this section shall preclude the enforcement according to its terms of any reciprocal indemnity provision whereby the employer of a person entitled to receive benefits under this chapter by virtue of section 1333 of Title 43 and the vessel agree to defend and indemnify the other for cost of defense and loss or liability for damages arising out of or resulting from death or bodily injury to their employees.

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43 U.S.C. § 1333. Laws and regulations governing lands

(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; International boundary disputes; restriction on State taxation and jurisdiction

(1) The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other

devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2)(A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(B) Within one year after September 18, 1978, the President shall establish procedures for setting[1] any outstanding international boundary dispute respecting the outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

(b) Longshore and Harbor Workers' Compensation Act applicable; definitions

With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshore and Harbor Workers' Compensation Act [33 U.S.C.A. § 901 et seq.]. For the purposes of the extension of the provisions of the Longshore and Harbor Workers' Compensation Act under this section –

(1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or

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[1] So in original. Probably should be "settling".

any agency thereof or of any State or foreign government, or of any political subdivision thereof;

(2) the term "employer" means an employer any of whose employees are employed in such operations; and

(3) the term "United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.

(c) National Labor Relations Act applicable

For the purposes of the National Labor Relations Act, as amended [29 U.S.C.A. § 151 et seq.], any unfair labor practice, as defined in such Act, occurring upon any artificial island, installation, or other device referred to in subsection (a) of this section shall be deemed to have occurred within the judicial district of the State, the laws of which apply to such artificial island, installation, or other device pursuant to such subsection, except that until the President determines the areas within which such State laws are applicable, the judicial district shall be that of the State nearest the place of location of such artificial island, installation, or other device.

(d) Coast Guard regulations; marking of artificial islands, installations, and other devices; failure of owner suitably to mark according to regulations

(1) The Secretary of the Department in which the Coast Guard is operating shall have authority to promulgate and enforce such reasonable regulations with respect to lights and other warning devices, safety equipment,

and other matters relating to the promotion of safety of life and property on the artificial islands, installations, and other devices referred to in subsection (a) of this section or on the waters adjacent thereto, as he may deem necessary.

(2) The Secretary of the Department in which the Coast Guard is operating may mark for the protection of navigation any artificial island, installation, or other device referred to in subsection (a) of this section whenever the owner has failed suitably to mark such island, installation, or other device in accordance with regulations issued under this subchapter, and the owner shall pay the cost of such marking.

(e) Authority of Secretary of the Army to prevent obstruction to navigation

The authority of the Secretary of the Army to prevent obstruction to navigation in the navigable waters of the United States is hereby extended to the artificial islands, installations, and other devices referred to in subsection (a) of this section.

(f) Provisions as nonexclusive

The specific application by this section of certain provisions of law to the subsoil and seabed of the outer Continental Shelf and the artificial islands, installations, and other devices referred to in subsection (a) of this section or to acts or offenses occurring or committed

thereon shall not give rise to any inference that the application to such islands and structures, acts, or offenses of any other provision of law is not intended.

R.S. 9:2780 CONVENTIONAL OBLIGATIONS OR CONTRACTS

§ 2780. Certain indemnification agreements invalid

A. The legislature finds that an inequity is foisted on certain contractors and their employees by the defense or indemnity provisions, either or both, contained in some agreements pertaining to wells for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, to the extent those provisions apply to death or bodily injury to persons. It is the intent of the legislature by this Section to declare null and void and against public policy of the state of Louisiana any provision in any agreement which requires defense and/or indemnification, for death or bodily injury to persons, where there is negligence or fault (strict liability) on the part of the indemnitee, or an agent or employee of the indemnitee, or an independent contractor who is directly responsible to the indemnitee.

B. Any provision contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, is void and unenforceable to the extent that it purports to or does provide for defense or indemnity, or either, to the indemnitee against loss or liability for damages arising out of or resulting

from death or bodily injury to persons, which is caused by or results from the sole or concurrent negligence or fault (strict liability) of the indemnitee, or an agent, employee, or an independent contractor who is directly responsible to the indemnitee.

C. The term "agreement," as it pertains to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, as used in this Section, means any agreement or understanding, written or oral, concerning any operations related to the exploration, development, production, or transportation of oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, including but not limited to drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, altering, plugging, or otherwise rendering services in or in connection with any well drilled for the purpose of producing or excavating, constructing, improving, or otherwise rendering services in connection with any mine shaft, drift, or other structure intended for use in the exploration for or production of any mineral, or an agreement to perform any portion of any such work or services or any act collateral thereto, including the furnishing or rental of equipment, incidental transportation, and other goods and services furnished in connection with any such service or operation.

D. (1) The provisions of this Section do not affect the validity of any insurance contract, except as otherwise provided in this Section, or any benefit conferred by the worker's compensation laws of this state, and do not deprive a full owner or usufructuary of a surface estate of

the right to secure an indemnity from any lessee, operator, contractor, or other person conducting operations for the exploration or production of minerals on the owner's land.

(2) Any language in this Section to the contrary notwithstanding, nothing in this Section shall affect the validity of an operating agreement or farmout agreement, as defined herein, to the extent that the operating agreement or farmout agreement purports to provide for defense or indemnity as defined in Subsection B of this Section. This exception shall not extend to any party who physically performs any activities pursuant to any agreement as defined in Subsection C of this Section. For purposes of this Subsection, operating agreement and farmout agreement shall be defined as follows:

(a) "Operating agreement" means any agreement entered into by or among the owners of mineral rights for the joint exploration, development, operation, or production of minerals.

(b) "Farmout agreement" means any agreement in which the holder of the operating rights to explore for and produce minerals, the "assignor", agrees that it will, upon completion of the conditions of the agreement, assign to another, the "assignee", all or a portion of a mineral lease or of the operating rights.

E. This Section shall have no application to public utilities, the forestry industry, or the sulphur industry, so long as the work being performed is not any of the operations, services, or activities listed in Subsection C above, except to the extent those operations, services, or activities are utilized in the sulphur industry.

F. The provisions of this Section do not apply to loss or liability for damages, or any other expenses, arising out of or resulting from:

(1) Bodily injury or death to persons arising out of or resulting from radioactivity; or

(2) Bodily injury or death to persons arising out of or resulting from the retainment of oil spills and clean-up and removal of structural waste subsequent to a wild well, failure of incidental piping or vales and separators between the well head and the pipelines or failure of pipelines, so as to protect the safety of the general public and the environment; or

(3) Bodily injury or death arising out of or resulting from performance of services to control a wild well so as to protect the safety of the general public or to prevent depletion of vital natural resources.

The term "wild well," as used in this Section, means any well from which the escape of salt water, oil, or gas is unintended and cannot be controlled by the equipment used in normal drilling practices.

G. Any provision in any agreement arising out of the operations, services, or activities listed in Subsection C of this Section of the Louisiana Revised Statutes of 1950 which requires waivers of subrogation, additional named insured endorsements, or any other form of insurance protection which would frustrate or circumvent the prohibitions of this Section, shall be null and void and of no force and effect.

Supreme Court, U.S.
FILED
SEP 3 1996
CLERK

No. 96-2

In The

Supreme Court of the United States

October Term, 1995

McDERMOTT, INC.,

Petitioner,

versus

CAPITAL WELDING AND FABRICATION, INC. and LANDRY ENTERPRISES, INC. of Morgan City,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS CAPITAL WELDING AND FABRICATION, INC. AND LANDRY ENTERPRISES, INC.

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26 pp

QUESTION PRESENTED FOR REVIEW

I.

Whether the courts below erred in holding that § 905(c) of the Longshore Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, did not apply to the contract between McDermott and Capital.

LIST OF PARTIES

The following was omitted from petitioner's list of parties:

1. Valerie A. Young, Staines, Eppling & Myers, 3500 No. Causeway Blvd., Suite 820, Metarie, LA, 70002, (504) 838-0019, Agent and Attorney-in-Fact for Respondents, Landry Enterprises, Inc. and Capital Welding and Fabrication, Inc.

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STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This is a dispute for contractual indemnity. McDermott, Inc. ("McDermott") contracted with Capital Welding and Fabrication, Inc. ("Capital") for the provision of welders to work on a fixed platform on the Outer Continental Shelf off the coast of Louisiana. Capital obtained the welders from Landry Enterprises, Inc. ("Landry"). The substance of the agreement between McDermott and Capital was contained in a McDermott form document entitled "Blanket Subcontractor's Agreement." Aside from the provision of laborers, no other obligation was incumbent upon Capital in the performance of the contract. Specifically, Capital was not required to provide a vessel for the performance of its contractual obligation, nor was the use of any vessel referenced in the agreement.

Wagner, an employee of Landry and at the platform pursuant to this agreement, claimed he sustained personal injury when he slipped in the washroom of a derrick barge, the DB 51. The derrick barge, owned by McDermott, was brought to the platform by that company for the purpose of housing the workers on the platform construction project. The fact that Wagner performed all of his work on the platform, however, is undisputed. The derrick barge was not mentioned in the contract, nor was it necessary for the performance of the welding work on the platform.

II. PROCEEDINGS BELOW

Wagner filed suit under the Jones Act, 46 U.S.C. § 688, against McDermott, Landry, and Capital, and included a claim against McDermott for unseaworthiness of the derrick barge. Wagner also brought an alternative claim under 33 U.S.C. § 905(b) of the Longshore and Harbor Workers' Compensation Act alleging vessel negligence. McDermott filed claims against Capital and Landry and their insurers for contractual indemnity under the Blanket Subcontractor's Agreement. The principal claims were settled and subsequently dismissed. McDermott's claims were the subject of cross-motions for summary judgment, which the district court denied. McDermott's claim for entitlement to contractual indemnity was tried on the merits on the briefs and evidence submitted. The district court found that the agreement was a non-maritime contract, and that state law applied as surrogate federal law under the Outer Continental shelf Lands Act, 43 U.S.C. § 1331, *et seq.* The district court further found that 33 U.S.C. § 905(c) of the LHWCA did not apply, as the agreement was not "vessel-related." As that provision was inapplicable, there was no question of inconsistency between § 905(c) and Louisiana law.

The U.S. Fifth Circuit affirmed the district court's judgment, calling the opinion "cogent and well-reasoned."[1] Noting that McDermott had hired Capital to do welding work on the fixed platform, the appellate

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[1] Petitioner's Appendix, p.1 hereafter "P.App. ___".

court concurred in the finding that the contract was non-maritime, and that § 905(c) did not apply because the indemnity provision was a non-vessel related indemnity agreement. The court declined to rule on the inconsistency issue because it was unnecessary.

Unlucky on two counts, McDermott, hoping the third time will prove to be the proverbial charm, petitions this Court for review on a writ of certiorari.

SUMMARY OF ARGUMENTS FOR DENYING THE WRIT

In its petition, McDermott, Inc. seeks to enforce a contractual indemnity agreement prohibited under controlling law, that of the state of Louisiana. McDermott now exaggerates the effect of the decisions below and paints their consequences with a broad brush gripped in a heavy hand. The judgment of the U.S. Fifth Circuit Court of Appeals in favor of Capital is not appropriate for review on a writ of certiorari. This Court is not now required to accept McDermott's invitation to expound upon § 905(c) of the Longshore and Harbor Workers' Compensation Act because that provision does not touch upon this case. The petition should be denied.

McDermott has presented no issue appropriate for this Court's review. There is no inconsistency between the decisions of the lower courts in this case and another U.S. Court of Appeals, nor a state court of last resort. There is no important question of federal law to be decided by this Court, nor are the lower courts' opinions in conflict with a relevant decision of this Court. McDermott in essence asks

this Court to reverse a finding of fact, i.e., that its contract with Capital is one between an employer and a vessel. This is not the "stuff" of which writs are made.

ARGUMENT

I. MCDERMOTT SEEKS REVIEW OF A FACTUAL ISSUE

The district court and the appellate court below both found that when McDermott contracted with Capital/Landry, it did so NOT as the owner of a vessel, but rather as a contractor.[2] Section 905(c) of the LHWCA, which would permit enforcement of the contractual indemnity provision, only applies to contracts between "the employer of a person. . . . and the vessel." Therefore, as the contract at issue was between an employer and a non-vessel contractor, § 905(c) of the LHWCA simply is not implicated in the contractual indemnity dispute.

McDermott is urging this Court to rule that Louisiana's Oilfield Indemnity Act, La. R.S. 9:2780, is inconsistent with § 905(c), and that as a matter of law, state law must be preempted by federal statute. Perhaps, in the future, this Court may have occasion to consider such a question. However, this case does not provide such an opportunity for the simple reason that § 905(c) does not apply to this indemnity agreement. The problems of inconsistency and federal preemption do not arise in this

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[2] P.App. pp. 7, 26; Minute Entry of the district court filed January 23, 1995, attached as Respondent's Appendix, p. 1 hereafter "R.App. ___".

case because, as this Court has previously observed, "for federal law to oust adopted state law federal law must first apply." *Rodrigue v. Aetna Casualty and Surety Company.*[3] Section 905(c) does not apply; hence, the issues urged by McDermott do not arise.

McDermott is asking this Court to review and ultimately reverse the factual finding that McDermott acted as a contractor, not as a vessel owner. That finding is amply supported by the record, and in the absence of compelling reasons to the contrary, is insufficient grounds to grant a writ of certiorari.[4] For this reason alone, the petition should be denied.

II. CORRECTNESS OF DECISION BOLSTERED BY *HODGEN V. FOREST OIL CORP.*

McDermott refers emphatically to the "extreme confusion" prevailing in the U.S. Fifth Circuit regarding the difference between maritime and non-maritime contracts. While McDermott's characterization is somewhat dramatic, to the extent any confusion did exist, it has been addressed and resolved by a recent decision less than two months old. Three months after the *Wagner* decision, the Fifth Circuit handed down its decision in *Hodgen v. Forest Oil Corp.*[5] McDermott does not address this case in its petition. Arguably, the *Hodgen* opinion renders McDermott's petition moot, since it endorses the result reached

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[3] 395 U.S. 352, 359, 89 S.Ct. 1835, 1839, 23 L.Ed.2d 360 (1969).

[4] Rules of the U.S. Supreme Court, Rule 10.

[5] 87 F.3d 1512 (5th Cir. 1996).

in *Wagner* and clearly establishes the three-part OCSLA test as the law of this circuit. Indeed, that opinion refers to the lower court decisions in this case with great esteem. Whatever merit McDermott's position may have had before *Hodgen,* that decision undermines McDermott's basic contention that maritime law controlled the enforcement of the contractual indemnity decision.

At issue in *Hodgen* was a contractual indemnity provision in a blanket agreement between a service contractor and the owner of a fixed platform on the Outer Continental Shelf. The court addressed the issue of the nature of the contract, and more importantly, by what method that issue was to be resolved. Some confusion had arisen as to whether state law applied of its own force, because the contract was non-maritime, or whether state law could only apply as a result of the three-part OCSLA test, of which analysis of the nature of the contract was an element. The *Hodgen* court held that Louisiana law would apply to vitiate the indemnity agreement if the three-step OCSLA test so dictated. The court's decision made clear that state law did not apply of its own force to the contractual dispute, but that it applied solely as a function of the legislative will as expressed through OCSLA.

The OCSLA test, first articulated in *Union Texas Petroleum v. PLT Engineering,*[6] requires the following: 1) an OCSLA situs; 2) that federal law not apply of its own force; and, 3) that state law must not be inconsistent with

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[6] 895 F.2d 1043 (5th Cir.), *cert. denied,* 498 U.S. 848, 111 S.Ct. 136, 112 L.Ed.2d 779 (1992).

federal law. As a matter of law, the *Hodgen* court found that federal law does not apply of its own force when, as in the present case, the contract at issue is non-maritime.

The validity of the *Wagner* opinion was enforced by *Hodgen*. Referring to the inconsistency between the cases that applied the three-part OCSLA test and the six-part maritime contract test,[7] that court observed that the "difficulty our case law has created, and the proper way to safety, are both evident in the recent opinion in *Wagner v. McDermott, Inc.*"[8] More importantly for our purposes, the court found that the Louisiana Oilfield Indemnity Act was not inconsistent with federal law as demonstrated by its reference to the *Knapp* decision, in which the U.S. Fifth Circuit declined to extend § 905(c) to non-vessel related indemnity agreements.[9] If the contract is not with a vessel, § 905(c) simply is not implicated, thus no inconsistency arises.[10]

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[7] *Davis & Sons v. Gulf Oil Corp.*, 919 F.2d 313, *reh. den.* 924 F.2d 1054 (5th Cir. 1990).

[8] 87 F.3d at 1524.

[9] 87 F.3d at 1528.

[10] McDermott argues earnestly that this Court must head off the looming conflict between general maritime law and Louisiana law lest maritime commerce be disrupted. Certainly, that conflict does not now arise, and, possibly, it never will. Theoretically, it is difficult to see how any such inconsistency would occur, as a contract "with a vessel" in the true sense would ostensibly be, in all likelihood, a maritime contract. If the contract is maritime, then in all probability, general maritime law would govern its enforcement, and Louisiana law would not be implicated.

Any argument that McDermott may have had is decimated by the subsequent *Hodgen* opinion, which cites the *Wagner* decisions below with enthusiasm. The rationale of *Hodgen* also indicates that McDermott's arguments as to admiralty jurisdiction and the principal § 905(b) claim miss the point. The issue and its proper resolution are much more narrow and straightforward than McDermott's petition conveys. If state law applies as a result of the OCSLA test, the contract is governed by Louisiana law. The jurisdiction of the federal court and the nature of the principal demand are not factors in determining the law governing the contract.

III. MCDERMOTT PROVIDES NO COMPELLING REASON TO GRANT THE WRIT

The principal purpose served by certiorari jurisdiction is to allow the United States Supreme Court to resolve conflicts among Circuit Courts of Appeal and state courts regarding the meaning of provisions of federal law. *Braxton v. U.S.*[11] The U.S. Fifth Circuit's affirmation of the district court decision in this case does not conflict with another federal appellate court decision, nor is there any relevant decision from a state court of last resort. In fact, none of the reasons cited by Rule 10 of the Rules of the Supreme Court of the United States are applicable here. Admittedly, that list is non-inclusive, yet McDermott still fails to provide a compelling reason for review.

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[11] 500 U.S. 344, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991).

McDermott's continued insistence on its role as a "vessel" for purposes of the Capital contract taints every other aspect of its argument. The meaning of § 905(c) of the LHWCA is not at issue in this case, and this Court need not decide if, in fact, § 905(c) is inconsistent with the Louisiana Oilfield Indemnity Act, La. R.S. 9:2780. Both lower courts declined to do so, correctly finding that the underlying facts and circumstances simply did not extend so far.

A. OCSLA TEST COMPELS APPLICATION OF LOUISIANA LAW

McDermott presents a grossly oversimplified and inaccurate view of the district court's holding that the contract at issue was non-maritime. McDermott claims the lower court found the contract non-maritime because "the magic word 'vessel' does not appear inside the four corners of the agreement."[12] McDermott misleads this Court with the assertion that the lower court reached its holding "because McDermott's blanket subcontractor's agreement with Landry did not specifically say that Wagner was to work aboard a vessel."[13] In fact, Wagner did not work aboard a vessel, nor did any of the contract welders. McDermott further states in its argument that the contract related to "the operations of its vessels," and that Wagner worked aboard the barge.[14] Both statements are patently untrue. McDermott's repeated references to

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[12] Petition for Writ, p. 7.

[13] Id. at pp. 4-5.

[14] Id. at p. 2.

"stevedore-vessel contractual relationships" are equally misleading. There is no stevedore in this case, nor is there a contract with a vessel.

The contract was found to be non-maritime because it lacked the requirements under the applicable jurisprudence indicating that it was "focused on the use of a vessel in a maritime transaction." *Theriot v. Bay Drilling Corp.*[15] The district court found that the specific work order called for the welders to work on an offshore platform, which was, in fact, precisely what they did. No work was done on the McDermott barge, which the district court found was only "incidentally related" to the primary project underway, i.e., the construction of the offshore platform, citing *Dupre v. Penrod Drilling Corp.*[16] The court found that the contract simply did not "require nor . . . address the supply and use of a vessel for performance of the welding services . . . "[17]

The U.S. Fifth Circuit adopted the lower court's reasoning, calling it a "thorough analysis," and held the contract was non-maritime. The rationale under which the subject contract was found to be non-maritime is in accord with all U.S. Fifth Circuit precedent, originating with *Davis, supra,* and extending through its progeny. The contract was found non-maritime because its subject matter was not related to the services of, nor was it performed on, a vessel. McDermott's characterization of a hyper-technical reasoning regarding the contract's nature is distorted and inaccurate.

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[15] 783 F.2d 527 (5th Cir. 1986)

[16] 993 F.2d 474, 477 (5th Cir. 1993)

[17] P.App. 19.

Because the contract is non-maritime, Louisiana law applies as a function of the Outer Continental Shelf Lands Act.[18] Consequently, the state statute prohibiting the kind of indemnity sought here, that afforded for injuries arising from the indemnitee's own negligence, applied and nullified the obligation.[19]

B. LAW APPLICABLE TO THE CONTRACT IS NOT GOVERNED BY THE COURT'S ADMIRALTY JURISDICTION OR THE NATURE OF THE PRINCIPAL DEMAND

McDermott argues that the maritime nature of the plaintiff's § 905(b) action and the district court's admiralty jurisdiction compel the application of § 905(c) to the contractual indemnity issue. To this end, McDermott cites *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Company,*[20] and *Sisson v. Ruby.*[21] The whole maritime nexus argument is unnecessary – the issue of the court's admiralty jurisdiction was never raised, and is a completely separate question from the law applicable to a particular contract. Neither of the United States Supreme Court cases cited by McDermott has anything to do with contracts or contractual indemnity. Maritime jurisdiction is not even in question here.

The law applicable to the contract is determined by the nature of the contract itself, not by the applicable tort

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[18] 43 U.S.C. § 1333.

[19] La. R.S. 9:2780.

[20] ___ U.S. ___, 115 S.Ct. 1043, 130 L.Ed.2d 1024 (1995).

[21] 497 U.S. 358, 110 S.Ct. 2892, 111 L.Ed.2d 292 (1990).

law governing the principal demand. *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*[22]; *Hale v. Co-Mar Offshore Corp.*[23]; *Home Insurance Company v. Garber Industries, Inc.*[24]; *Heath v. Superior Oil Co.*[25] The fact that the only surviving claim plaintiff had against McDermott was a § 905(b) claim, and that the district court had admiralty jurisdiction over the entire case, did not lead inexorably to application of § 905(c) to the indemnity agreement, absent the necessary vessel-related contract.

McDermott's invocation of the legislative history does not serve its purposes. The critical language pertaining to preemption of state law, the consummation for which McDermott devoutly wishes here, was omitted from the final version of the conference report, as McDermott itself finally admits. In everything written about § 905(c), from legislative history reports to pertinent case law, its limited application to vessel-related contracts alone is apparent. See *Campbell v. Sonat Offshore Drilling, Inc.*[26]; *Knapp v. Chevron USA, Inc.*[27]; *Doucet v. Gulf Oil Corp.*[28]; *Fontenot v. Mesa Petroleum Co.*[29] Authority does not exist for the preemption of applicable state law, nor for the application of § 905(c) to non-vessel related contracts.

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[22] 754 F.2d 1223, 1231-32 (5th Cir. 1985).

[23] 588 F.Supp. 1212, 1214-15 (W.D.La. 1984).

[24] 588 F.Supp. 1218, 1220-21 (W.D.La. 1984).

[25] 617 F.Supp. 33 (W.D.La. 1985).

[26] 979 F.2d 1115 (5th Cir.), *reh. denied*, 979 F.2d 1115 (1992).

[27] 781 F.2d 1123 (5th Cir. 1986).

[28] 783 F.2d 518 (5th Cir. 1986).

[29] 791 F.2d 1207 (5th Cir. 1986).

McDermott also argues that federal law governs the contractual indemnity provision based on *Yamaha Motor Corporation U.S.A. v. Calhoun*,[30] *Foremost Insurance Co. v. Richardson*,[31] and *Grubart, supra.* Each case cited by McDermott is a tort case and is concerned with maritime tort jurisdiction. This is a contractual dispute. The underlying tort does not dictate the law which applies to the contract.

If the "remedy follows the jurisdiction," as McDermott claims,[32] any number of factors could be manipulated to trigger application of a particular body of law to a contract for offshore services. For example, were it not for McDermott's unilateral election to introduce a vessel into the work place, the possibility of a § 905(b) claim would disappear and applicability of § 905(c) would not be an issue. Likewise, if plaintiff's Jones Act claim had been successful, McDermott's logic would compel application of maritime law, even though it is well established that the provision of seamen does not necessarily make the controlling contract maritime.[33] Such an argument is nonsensical. The governing law is dictated by the nature of the contract.

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[30] ___ U.S. ___, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996).

[31] 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982), *reh. den.*, 459 U.S. 899, 103 S.Ct. 198, 74 L.Ed.2d 160 (1982).

[32] Petition for writ, p. 21.

[33] *Laredo*, 754 F.2d at 1231; *Wilson v. J. Ray McDermott & Co., Inc.*, 616 F.Supp. 1301 (E.D.La. 1985).

C. THE PREEMPTION ISSUE DOES NOT ARISE

McDermott claims that § 905(c) must be given preemptive effect because to do otherwise would contravene this Court's expressed desire for uniformity. It is worth noting that any argument for preemption assumes the application of Louisiana law as an initial premise, in order for there to be something to preempt. Although McDermott never makes this admission explicitly, if Louisiana law applies through OCSLA, the contract must be non-maritime. If the contract is non-maritime, it is hard to conceive of a situation in which it could also be a contract "between an employer . . . and the vessel" for purposes of § 905(c). As a result, it is highly improbable that both Louisiana law and § 905(c) would ever apply simultaneously, making preemption an issue. In any event, as the subject contract is not vessel-related, § 905(c) does not apply and there is no preemption argument to be made here.

McDermott would be well served to review this Court's holding in *Rodrigue, supra.* This Court stated that, in enacting OCSLA, Congress assumed that admiralty law should not apply to the Outer Continental Shelf unless Congress made it apply. Congress then elected not to have admiralty law apply and to treat offshore platforms as federal enclaves, not as vessels.[34] The adoption of state law as surrogate federal law demonstrates Congress' admission that maritime law was simply "inapposite to these fixed structures."[35] The drafters of the

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[34] 89 S.Ct. at 1839.

[35] Id. at 1840.

statute were keenly aware of the "inaptness" of admiralty law for dealing with the resources of the seabed and subsoil.[36]

The Fifth Circuit echoed the same theme in *Laredo*,[37] holding that a contract for the building of a fixed platform on the Outer Continental Shelf was not subject to admiralty jurisdiction. "It is apparent that Congress, in passing the OCSLA, made a determination that maritime law, which never before had to deal with the extraction of minerals from the sea bottom, was unsuited to the task and that state law as adopted federal law should control."[38] While an agreement to transport people and supplies in a vessel to and from a well site on navigable waters would be a maritime contract, and thus suggests a sufficient maritime nexus for the exercise of maritime law to any resulting contractual controversy, a contract for the provision of welders related to platform construction does not offer such a maritime connection.

McDermott now petitions this Court seeking the "protection of Federal law" from the "adverse impact on an important area of the national economy caused by patchwork rules" resulting from OCSLA's application of state law.[39] McDermott's interest in the supremacy of

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[36] Id. at 1841.

[37] 754 F.2d 1223 (5th Cir. 1985).

[38] 754 F.2d at 1228.

[39] The idea that McDermott, a multinational conglomerate of colossal proportions, needs protection from a "mom and pop" labor supplier, rather strains credibility. McDermott wasted no energy "shaking its corporate head" when capital went out of business because of McDermott's cancellation of all

federal law is clearly selective – OCSLA is just as much a product of the legislative will as the LHWCA, yet its purpose and function, which is directly responsible for the application of Louisiana law in the present dispute, is summarily ignored by McDermott. Indeed, were it not for OCSLA, the plaintiff would not have had recourse to the LHWCA.[40]

D. NO INCONSISTENCY WITHIN THE U.S. FIFTH CIRCUIT

Finally, McDermott contends that there is an inconsistency within the U.S. Fifth Circuit between the appellate decision in this case and that in *Campbell, supra,* decided just four years ago. *Campbell* is distinguishable primarily because the contract at issue was deemed maritime following application of the three-part OCSLA test. The contract called for a casing crew to perform casing services form a vessel, using the vessel's gear and equipment. Neither the contract's place of performance, nor the location of the subject injury, occurred on an OCSLA situs. The *Davis* analysis revealed a maritime contact, so general maritime law controlled. On this basis alone, the case is distinguishable and inapposite.

Furthermore, the § 905(c) dispute in that case concerned the "reciprocity requirement" of the provision, not whether it was preemptive of state law, or otherwise applicable if the contract was non-maritime. Nothing in

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contracts in retaliation for the failure to pay its defense costs on this claim.

[40] 43 U.S.C. § 1333.

the § 905(c) discussion relates to McDermott's arguments here. The *Campbell* court ultimately held that, as general maritime law permitted contractual choice of law provisions, Texas law was applicable and did not conflict with maritime law. Both *Campbell* and this case relied upon the OCSLA three-part test. The differing results are attributable to the varying factual scenarios. The U.S. Fifth Circuit's opinion in *Campbell* is not inconsistent with the instant case.

CONCLUSION

For the reasons set out above, this is not a case worthy of the Court's limited judicial resources, and a writ of certiorari should not be issued.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE/OPELOUSAS DIVISION

Date: January 23, 1995
Reply To: Judge Doherty
Subject: Wagner vs. McDermott, Inc., et al, CV93-0715
To: All Counsel of Record

MINUTE ENTRY
(Filed Jan. 23, 1995)

A telephone status conference was held in this matter before Judge Rebecca F. Doherty on January 19, 1995. The following counsel participated on line: For the plaintiff, Thomas Edwards; for Defendant McDermott, James Doyle; for Defendant Capital/Landry, Thomas Eppling; for Defendant Commercial Union, Gary Kraus; for Defendant Storebrand, J. Clayton Davie, Jr.

The Court discussed McDermott's recently filed Motion to Amend Findings of Fact and Judgment pursuant to Rule 52(B) and Motion for New Trial pursuant to Rule 59. In light of the fact that a judgment has not been issued in this case, the Court believes that McDermott's motion is better termed a Motion to Reconsider the Court's Reasons for Judgment. The Court acknowledges that McDermott did not own the platform on which Plaintiff Wagner was working; however, the Court finds that this fact does not alter the analysis and outcome of this Court's Reasons for Judgment.

All Counsel agreed that McDermott was involved in building and construction of and on the fixed platform

upon which Plaintiff Wagner was working. Accordingly, this Court hereby GRANTS McDermott's motion *in part* and ALTERS its Reasons for Judgment in the following limited respects:

1. Any reference to a "McDermott offshore platform" should be changed to "an offshore platform."

2. Any reference to McDermott as a "platform owner" should be changed to read "contractor involved in the building and construction of and on a fixed platform."

The Court has reviewed McDermott's memorandum and supplemental memorandum in support of its motion. The Court finds McDermott incorrect in its assertion that "the Court heavily relied on its assumption that McDermott owned a platform affixed to the sea bed of the outercontinental shelf" in reaching its decision. The Court directs McDermott to the section in its Reasons for Judgment in which the Court applied the *Davis* factors to the contract between McDermott and Capital/Landry. The Court believes that in determining whether the blanket subcontractor's agreement in this case was a maritime versus non-maritime contract, it does not matter who owned the platform on which Plaintiff Wagner was working. Rather, applying the *Davis* factors to the contract is what determines the nature of the contract.

In addition, the Court did not rely on its assumption that McDermott owned the platform in concluding that the provisions of 905(c) do not void any Louisiana law to the contrary. The Court simply found 905(c) inapplicable to the facts of this case because it found that there was no "agreement between the vessel and the employer" as

required by 905(c). Although McDermott was not a "platform owner," this fact does not change this Court's finding that there was no agreement between "the vessel and the employer." Accordingly, the Court hereby DENIES the remainder of McDermott's motion, as the Court believes its analysis and conclusions of its Reasons for Judgment are sound.

The Court ORDERED counsel for Commercial Union to make sure that counsel submit a judgment agreed to by all parties reflecting this Court's ruling to the Court for signature on or before January 27, 1995.

MOTION FILED
SEP - 3 1996

(3)

In the
Supreme Court of the United States

OCTOBER TERM, 1995

NO. 96-2

McDERMOTT, INC.
Petitioner

versus

CAPITAL WELDING & FABRICATION, INC. AND
LANDRY ENTERPRISES, INC. OF MORGAN CITY
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION OF FOREST OIL CORPORATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND BRIEF *AMICUS CURIAE*

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24 pp

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

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CAPITAL WELDING & FABRICATION, INC. AND LANDRY ENTERPRISES, INC. OF MORGAN CITY

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF FOREST OIL CORPORATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Forest Oil Corporation hereby respectfully moves the Court for leave to file a brief *amicus curiae* in support of the petition for writ of certiorari as provided in Rule 37 of the Rules of this Court. The consent of the attorneys for Petitioner, McDermott, Inc., Aetna Casualty & Surety Company, Commercial Union and Mark Wagner has been obtained. The consent of the attorneys for Respondents, Landry Enterprises, Inc. and Capital Welding and Fabrication, Inc., and Storebrand Insurance Co., UK Ltd. was requested but has not been granted. Copies of letters verifying the above have been filed with the Clerk.

Forest Oil Corporation is currently involved in litigation involving the enforcement of a similar maritime indemnity provision in *Forest Oil Corporation and Ronald Doucet v. Operators & Consulting Services, Inc., Various Underwriters, A&A Boats, Inc., C&G Marine Service, Inc., Commercial Union Insurance Company, and Albany Insurance Company,* now pending before the U.S. Fifth Circuit Court of Appeals, docket no. 94-41244. A decision in that matter was reported in *Hodgen v. Forest Oil Corporation,* 87 F.3d 1512 (5th Cir. 1996), and the case is presently awaiting acceptance and resolution of insurance-related certified questions by the Louisiana Supreme Court.

In the course of litigating the *Hodgen* matter, Forest came to realize early-on that jurisprudence in the area of indemnity for the maritime risks related to offshore platform activities is confusing and inconsistent and lacks an authoritative standard. Reviewing the numerous cases emanating from the U.S. Fifth Circuit Court of Appeals (viewed by many as the pre-eminent jurisdiction for developing maritime policy) we noted several Justices expressing their

confusion and frustration and asking "why" they were being made to reach the decisions they were reaching.

The argument in McDermott's petition for writ of certiorari focuses primarily on the applicability of section §905(c) of the Longshore and Harbor Workers Compensation Act. In Forest's *amicus curiae* brief, Forest focuses instead on the Fifth Circuit's use of state law to void an indemnity clause in McDermott's contract expressly providing indemnity for a maritime risk, unseaworthiness. The application of state law to indemnity of maritime risks is an issue of the deepest concern to all involved in the offshore industry. The issue, therefore, has implications extending far beyond the particular case now before the Court, and we believe that our contribution will assist the Court in setting the issue into a meaningful and broader, industry-wide context, thus ensuring a more comprehensive grasp of the import that this decision may have on maritime parties throughout the nation.

For these reasons, Forest Oil Corporation respectfully requests leave to file a brief *amicus curiae* supporting the petition for writ of certiorari.

Respectfully submitted,

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THE QUESTION PRESENTED FOR REVIEW

Whether maritime law applies to enforce a contract provision providing indemnity for maritime risks arising from unseaworthiness or vessel negligence on behalf of the vessel owner.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

NO. 96-2

McDERMOTT, INC.

Petitioner

versus

CAPITAL WELDING & FABRICATION, INC. AND LANDRY ENTERPRISES, INC. OF MORGAN CIATY

Respondents

BRIEF *AMICUS CURIAE* OF FOREST OIL CORPORATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Forest Oil Corporation submits this brief as *amicus curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

The interest of Forest Oil Corporation is set forth in Forest's motion for leave to file this brief *amicus curiae* in support of the petition for writ of certiorari. Forest Oil Corporation is a litigant in a matter involving, at least in part, similar issues as the instant case and has an interest in the outcome of this litigation due to its significant effect upon the maritime industry in which Forest is engaged.

STATUTES INVOLVED IN THE CASE

The Outer Continental Shelf Lands Act (OCSLA)

The relevant provisions of the Outer Continental Shelf Lands Act (hereinafter OCSLA) is set forth below:

43 U.S.C. §1333 Laws and regulations governing lands

(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; International boundary disputes; restriction on State taxation and jurisdiction

(1) The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State; *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2)(A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereinafter adopted, amended, or repealed

are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable law shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

. . .

The Louisiana Oilfield (Anti)Indemnity Statute (LOIA)

The relevant provisions of the Louisiana Oilfield (Anti)Indemnity Statute (hereinafter LOIA) is set forth below:

R.S. §9:2780 Certain Indemnification agreements invalid

A. The legislature finds that an inequity is foisted on certain contractors and their employees by the defense or indemnity provisions, either or both, contained in some agreements pertaining to wells for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, to the extent those provisions apply to death or bodily injury to persons. It is the intent of the legislature by this Section to declare null and void and against public policy of the state of Louisiana any provision in any agreement which requires defense and/or indemnification, for death or bodily injury to persons, where there is negligence or fault (strict liability) on the part of the indemnitee, or an agent or employee of the indemnitee, or an independent contractor who is directly responsible to the indemnitee.

B. Any provision contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, is void and unenforceable to the extent that it purports to or does provide for defense or indemnity, or either, to the indemnitee against loss or liability for damages arising out of or resulting from death or bodily injury to persons, which is caused by or results from the sole or concurrent negligence or fault (strict liability) of the indemnitee, or an agent, employee, or an independent contractor who is directly responsible to the indemnitee.

C. The term "agreement," as it pertains to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, as used in this Section, means any agreement or understanding, written or oral, concerning any operations related to the exploration, development, production, or transportation of oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, including but not limited to drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, altering, plugging, or otherwise rendering services in or in connection with any well drilled for the purpose of producing or excavating, constructing, improving, or otherwise rendering services in connection with any mine shaft, drift, or other structure intended for use in the exploration for or production of any mineral, or an agreement to perform any portion of any such work or services or any act collateral thereto, including the furnishing or rental of equipment, incidental transportation, and other goods and sevices furnished in connection with any such service or operation.

D. (1) The provisions of this Section do not affect the validity of any insurance contract, except as otherwise provided in this Section, or any benefit conferred by the worker's compensation laws of this state, and do not deprive a full owner or usufructuary of a surface estate of the right to secure an indemnity from any lessee, operator, contractor, or other person conducting operations for the exploration or production of minerals on the owner's land.

(2) Any language in this Section to the contrary notwithstanding, nothing in this Section shall affect the validity of an operating agreement or farmout agreement, as defined herein, to the extent that the operating agreement or farmout agreement purports to provide for defense or indemnity as defined in Subsection B of this Section. This exception shall not extend to any party who physically performs any activities pursuant to any agreement as defined in Subsection C of this Section. For purposes of this Subsection, operating agreement and farmout agreement shall be defined as follows:

(a) "Operating agreement" means any agreement entered into by or among the owners of mineral rights for the joint exploration, development, operation, or production of minerals.

(b) "Farmout agreement" means any agreement in which the holder of the operating rights to explore for and produce minerals, the "assignor", agrees that it will, upon completion of the conditions of the agreement, assign to another, the "assignee", all or a portion of a mineral lease or of the operating rights.

E. This Secton shall have no application to public utilities, the forestry industry, or the sulphur industry, so long as the work being performed is not any of the operations, services, or activities listed in Subsection C above, except to the extent those operations, services, or activities are utilized in the sulphur industry.

F. The provisions of the Section do not apply to loss or liability for damages, or any other expenses, arising out of or resulting from:

(1) Bodily injury or death to persons arising out of or resulting from radioactivity; or

(2) Bodily injury or death to persons arising out of or resulting from the retainment of oil spills and clean-up and removal of structural waste subsequent to a wild well, failure of incidental piping or vales and separators between the well head and the pipelines or failure of pipelines, so as to protect the safety of the general public and the environment; or

(3) Bodily injury or death arising out of or resulting from performance of services to control a wild well so as to protect the safety of the general public or to prevent depletion of vital natural resources.

The term "wild well,' as used in this Section, means any well from which the escape of salt water, oil, or gas is unintended and cannot be controlled by the equipment used in normal drilling practices.

G. Any provision is any agreement arising out of the operations, services, or activities listed in Subsection C of

this Section of the Louisiana Revised Statutes of 1950 which requires waivers of subrogation, additional named insured endorsements, or any other form of insurance protection which would frustrate or circumvent the prohibitions of this Section, shall be null and void and of no force and effect.

STATEMENT OF THE CASE

Mark Wagner was injured when he slipped and fell on the deck of the Derrick Barge 51 (hereinafter DB 51),owned by McDermott, Inc. (hereinafter McDermott), as he was headed to its restroom facilities. The DB 51 provided living quarters and other facilities to Wagner and his crew who were working on a McDermott offshore platform. Wagner was a welder who, at the time of his injury, was on loan to Capital Welding & Fabrication, Inc. (hereinafter "Capital"). Capital had a Blanket Subcontractor's Agreement with McDermott which contained an indemnity provision by which Capital agreed to indemnify McDermott for any claim made by Capital's employees, including those claims arising out of the negligence and unseaworthiness of vessels owned by McDermott. (The text of the indemnity provision is quoted later in this brief.)

Wagner filed suit against McDermott and others in the U.S. District Court for the Western District of Louisiana alleging that he was injured as the result of an unseaworthy condition of the DB 51 or due to vessel negligence. Wagner's claims were settled, and McDermott seeks indemnity from Capital under the indemnity provision. The District Court denied indemnity, and the Fifth Circuit Court of Appeals affirmed.

SUMMARY OF ARGUMENT

This brief is submittd on behalf of Forest Oil Corporation and in support of the petition for writ of certiorari and presents relevant matters not already brought to the Court's attention.

Mr. Wagner's injury occurred aboard a vessel and was caused by maritime risks, unseaworthiness and vessel owner negligence. **The indemnity clause in the contract between McDermott and Capital expressly provided that Capital would indemnify McDermott for injuries arising from unseaworthiness.** As such, the indemnity provision itself is a maritime obligation, separately enforceable from the contract "as a whole" under the maritime law.

The Fifth Circuit made a fundamental error when it failed to apply maritime law to the indemnity provision, and as a result offshore industry and commerce has been thrown into greater chaos and confusion. Justices in the Fifth Circuit have all but begged for authoritative guidance in this confusing area. Intervention by the United States Supreme Court is necessary to lend certainty and predictability, thereby reducing future litigation and the expenditure of valuable judicial resources.

ARGUMENT

A. THE CLAUSE PROVIDING INDEMNITY FOR MARITIME RISKS IS ENFORCEABLE UNDER THE MARITIME LAW.

The McDermott/Capital agreement contains a clause

which expressly provides that Capital will indemnify McDermott in the event of an injury arising out of the unseaworthiness of McDermott's vessels or McDermott's negligence. The contract states in relevant part as follows:

> VII. A. Subcontractor shall protect, defend, indemnify and hold harmless McDermott, its employees, officers, and agents, against all claims demands or causes of action by Subcontractor, Subcontractor's employees, officers or agents or their successors-in-interest for personal injury or death or property damage or destruction arising out of or in any way related to the performance by Subcontractor of any work covered hereby or by the failure of Subcontractor so to perform, howsoever such personal injury or death or property damage or destruction is cause, ***including the sole or concurrent fault or negligence of McDermott,*** its employees, officers or agents ***and/or the unseaworthiness of vessels*** which are owned, operated or chartered by McDermott regardless of whether said unseaworthiness pre-existed the execution of the Agreement. [Emphasis added].
>
> ...

Plaintiff was injured when he slipped and fell on soapy water on a vessel owned by McDermott. Plaintiff alleged that his injury was caused by maritime risks, unseaworthiness or vessel negligence, and his claim thus falls within the scope of the indemnity provision.

This appeal arises due to the conflict between maritime and state law on whether to enforce the indemnity in McDermott's contract. If maritime law applies, the indemnity provision will be enforced. 1 T. Schoenbaum, Admiralty and Maritime Law §5-20, at 227 (2d ed. 1994) ("Contract indemnity — based on an express agreement between the parties— is generally available and enforceable in admiralty."); *Lirette v. Popich Brothers Water Transport, Inc.*, 699 F.2d 725 (5th Cir. 1983) (maritime law requires that express indemnity agreements be enforced according to their terms). 33 U.S.C. §905(c). Under state law, however, the Louisiana Oilfield Anti-Indemnity statute, La. R.S. §9:2780, voids the indemnity agreement.

The U.S. District Court and Fifth Circuit Court of Appeals applied state law to invalidate the indemnity clause. The basis of these Courts' decisions was that the contract "as a whole" was non-maritime in nature. The Courts erred, however, in failing to recognize the maritime nature of the indemnity provision itself, which can be separately enforced.

The question squarely placed before this Court is: **Should maritime law apply to an express agreement to indemnify a maritime risk?** The indisputable answer must be "Yes." There is no question that maritime law enforces agreements for the indemnity of maritime risks. This conclusion is confirmed by numerous authorities applying maritime law to insurance policies insuring maritime risks. 1 *Benedict on Admiralty* §184, §219. *Angelina Casualty Company v. Exxon Corporation, U.S.A. Inc.*, 876 F.2d 40 (5th Cir. 1989) (an agreement to indemnify another for maritime exposures is not voided by the LOIA and must be enforced under the maritime law).

The Courts have gone to great lengths deciding whether the contract "as a whole" is maritime or non-maritime. However, categorization of the nature of the contract "as a whole" is inappropriate in circumstances where there is a mixed contract with both maritime and non-maritime obligations and where the maritime obligations are separable. 1 *Benedict on Admiralty* §183 at 12-10, 11 (where there are maritime elements in a mixed contract which are capable of being litigated separately without prejudice to either party, there is admiralty jurisdiction over the maritime obligations). **The operative indemnity provision itself is expressly maritime** and, as such, is separable from the non-maritime elements of the contract.[1]

The decision of the District Court and the Fifth Circuit Court of Appeals is thus contrary to the rule of law and has led to error which will have significant effects upon other maritime parties.

B. THE SUPREME COURT SHOULD SETTLE THESE IMPORTANT QUESTIONS OF FEDERAL LAW.

The effect of state laws on the indemnity of maritime risks reaches many, ***many*** more parties than those involved in the present litigation. Industries engaged in offshore

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[1] The separability of an indemnity obligation is analogous to the separate obligation to procure insurance which may be contained in a contract for services. Because the obligation to procure insurance is capable of being litigated separately it is subject to a choice of law analysis separate from that of the contract "as a whole." *See, e.g., Angelina Casualty Company v. Exxon Corporation, U.S.A. Inc.*, 876 F.2d 40 (5th Cir. 1989).

oil exploration and other maritime commerce constitute a significant portion of the economic strength and vitality of the states involved and, indeed, the country as a whole.

Companies engaged in offshore platform activities recognize that their work inherently involves risks of both a maritime and non-maritime nature. For public policy reasons and due to the significant investment and risks involved, federal law traditionally allows parties to allocate the financial burden of maritime risks by contract. Incorporation of such agreements into contracts is an accepted standard in the maritime industry and such contractual arrangements are, for the most part, honored by courts sitting in admiralty. The result of this simple concept is predictability and order.

Allowing state concerns to upset the clear and unmistakable maritime rule of law will lead to confusion and chaos and will cause chilling and economically disastrous effects on maritime commerce. When injury occurs on a vessel as the result of a maritime risk, forcing our courts to engage in a fact-intensive analysis of the nature of the contract "as a whole" to determine whether an express maritime indemnity provision should be honored, leads away from a uniform, brightline standard. When such occurs, it may cause results never contemplated by the contracting parties and leads litigants and courts alike into a maze of uncertainty, away from unity and into controversy.

Because of the number and frequency of decisions emanating from the U.S. Fifth Circuit Court of Appeal on issues of maritime law, such decisions are generally accorded great deference in other federal and state jurisdictions

where less precedent may exist. In a significant portion of the country, decisions by the Fifth Circuit Court of Appeals are viewed, for the most part, as gospel on maritime issues.

The decision by the Fifth Circuit, however, is contrary to the accepted rules of engagement in the arena of maritime contracts, as more fully discussed above. If left unchecked this decision will lead to greater confusion and unpredictability in an area already fraught with troubled economic risks and uncertainties, resulting in increased litigation and the expenditure of greater judicial resources. Authoritative supervision in this arena is not only necessary, but has been invited by justices in the Fifth Circuit.[2]

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[2] The confusion and unpredictability of litigation in this area is made abundantly clear by the numerous recent comments of various panels of the U.S. Fifth Circuit Court of Appeals expressing their concern and overwhelming need for a uniform rule of law. For example, in *Smith v. Penrod Drilling Corporation* 960 F.2d 456 (5th Cir. 1992) the Fifth Circuit stated:

> In each new case, a panel of this court must comb through a bewildering array of cases that rely upon inconsistent reasoning in the hope of finding an identical fact situation. [Footnote containing numerous citations omitted.] Absent an en banc decision, cases are decided on what seems to be a random factual basis. *See Lewis,* 898 F.2d at 1084 ("[B]ecause of an apparent contradictory line of cases in our circuit and the uncertain policy underpinning our result, the appellant would justly ask "why?").

Smith v. Penrod, 960 F.2d at 461. *See also Hodgen v. Forest Oil Corporation,* 87 F.3d 1512, 1523 n.8 (5th Cir. 1996) ("We have on previous occasion expressed our frustration with the inconsistency of our case law in this general area. [Numerous citations omitted.]"); *Campbell v. Sonat Offshore Drilling, Inc.,* 979 F.2d 1115, 1121 (5th Cir. 1992); *Lewis v. Glendel Drilling Company,* 898 F.2d 1083, 1084, 1987-88 (5th Cir. 1990), *cert. denied,* 502 U.S. 857, ___ S.Ct. ___, ___ L.Ed.2d ___ (1991).

This court stands as the gatekeeper and as the enforcer of public policy expressed by the United States legislature when it sought to prevent state concerns from interfering with established maritime principles by expressly limiting the applicaton of state law under the Outer Continental Shelf Lands Act.[3] For the reasons of public policy embodied in the traditional maritime rule of law and those expressed by the United States legislature, state anti-indemnity statutes cannot be allowed to effect the enforcement of agreed-upon allocations of maritime risks. Such interference is an important and significant question of federal law, and should be settled once and for all by the United States Supreme Court.

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[3] 43 U.S.C. §1333(a)(2)(A) (state laws apply only to the extent that they are "not inconsistent with other Federal laws"). *See also Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 106 S.Ct. 2485, 2491-92, 91 L.Ed.2d 174 (1986) (the statute contains a "prescription that the Act not be construed to affect the high seas which cover the Continental Shelf."); *Recar v. CNG Producing Company*, 853 F.2d 367, 369 (5th Cir. 1988) (where admiralty and OCSLA juridicition overlap, the case is governed by maritime law).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a copy of the **MOTION OF FOREST OIL CORPORATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND BRIEF *AMICUS CURIAE*** was served upon the following counsel by first class U.S. Mail, postage prepaid on the 3rd day of September 1996.

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Supreme Court, U.S.
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No. 96-2

In The

Supreme Court of the United States

October Term, 1995

MCDERMOTT, INC.,

Petitioner,

versus

CAPITAL WELDING AND FABRICATION, INC. AND LANDRY ENTERPRISES, INC. OF MORGAN CITY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF ON BEHALF OF CAPITAL WELDING AND FABRICATION, INC. AND LANDRY ENTERPRISES, INC. IN OPPOSITION TO MOTION OF FOREST OIL CORPORATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATUTE:

33 U.S.C. § 901, et seq..... 1

BRIEF IN OPPOSITION TO MOTION OF FOREST OIL CORPORATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Forest Oil Corporation ("Forest"), a stranger to this litigation but no stranger to contractual indemnity disputes in the offshore oil industry, has submitted its arguments in favor of McDermott, Inc.'s Petition for a Writ of Certiorari as a friend of the court. Forest asserts that the contractual obligation to indemnify another for marine risks is a separable maritime obligation in a mixed contract, and even if the remainder of the contract is non-maritime and subject, under OCSLA, to Louisiana law, maritime law should apply to the indemnity obligation.

As a preliminary matter, the issue raised by Forest ("Should maritime law apply to an express agreement to indemnify a maritime risk?", Brief Amicus Curiae, p. 10), is different than McDermott's issue, the applicability and/or preemptive effect of § 905(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901, et seq., on a non-maritime contract. Forest's brief does not simply introduce new arguments; it introduces a new issue absent from the petitioner's writ application. Accordingly, the amicus brief should not be considered by this Court.

Forest is quite correct that there is in the U.S. Fifth Circuit authority for the notion of a "mixed contract", i.e., a contract containing both maritime and non-maritime obligations. If the contract is maritime, but the injury arises out of the performance of a separable non-maritime obligation, state law governs the indemnity dispute. *Thurmond v. Delta Well Surveyors*, 836 F.2d 952 (5th Cir. 1988), *reh. denied*, 844 F.2d 788 (5th Cir. 1988). Conversely,

if the injury occurs in the performance of a maritime obligation, in an otherwise non-maritime contract, the indemnity provision is subject to maritime law. For example, a drilling contractor may agree to furnish a supply boat (a maritime obligation) as part of an offshore drilling contract to be performed on a fixed platform (a non-maritime obligation). A supply boat crewmember is injured, and brings suit, alleging unseaworthiness, against the drilling contractor and the platform owner. The platform owner sues the drilling contractor for contractual indemnity and wins, because the injury arose of a separable maritime obligation, the provision of the supply boat, under the contract. This was the scenario in *Hale v. Co-Mar Offshore Construction*, 588 F.Supp. 1212, 1214 (W.D.La. 1984).

However, the mere presence of a maritime obligation in a mixed contract does not infuse the contract with maritime status. The U.S. Fifth Circuit has said, in an opinion which must inform the result in this case, that "It is fundamental that the mere inclusion of maritime obligations in a mixed contract does not, without more, bring nonmaritime obligations within the pale of admiralty law." *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1231 (5th Cir. 1985). Application of admiralty law to contracts relating to offshore mineral exploration is particularly suspect in light of the legislative choices embodied in the OCSLA. *Laredo*, 754 at 1232, citing this Court's opinion in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969).

The defect in Forest's argument is that the underlying claim for which indemnity is demanded did not arise out of a separable maritime obligation under the blanket

service agreement. The primary obligation under the contract at issue was the provision of welders to perform welding on a fixed offshore platform. It was in the performance of this primary and non-maritime obligation that the plaintiff allegedly sustained his injury. The plaintiff claimed he slipped and fell in the washroom on the adjacent barge which served as living quarters. With respect, it is submitted that answering the call of nature, albeit on a vessel, cannot be considered a separable maritime obligation under the McDermott/Capital agreement. Plaintiff was in performance of the principal, non-maritime, obligation under the contract when the subject incident arose.

Forest is in error when it states, "There is no question that maritime law enforces agreements for the indemnity of maritime risks. This conclusion is confirmed by numerous authorities applying maritime law to insurance policies insuring maritime risks." A policy of marine insurance is regarded as a maritime contract. That is why maritime law applies. *New Hampshire Insurance Co. v. Martech USA, Inc.*, 993 F.2d 1195 (5th Cir. 1991). A contract to procure marine insurance is not regarded as a maritime contract, and not subject to maritime law. *Angelina Casualty Company v. Exxon Corporation, U.S.A., Inc.*, 876 F.2d 40 (5th Cir. 1989). Maritime law applies to a contractual indemnity agreement when the injury for which indemnity is demanded occurs in the performance of a maritime contract, or when the injury occurs during the performance of a separable maritime obligation in a mixed contract. *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 538 (5th Cir. 1986); *Hollier v. Union Texas Petroleum Corp.*,

972 F.2d 662, 665 (5th Cir. 1992). Neither scenario fairly describes the situation here.

Forest's argument does not overcome application of the OCSLA three-part analysis, nor the resulting application of state law as surrogate federal law under OCSLA. Neither McDermott nor Forest has addressed the issue of OCSLA and its clear directive that the law of the adjacent state be applied to disputes on the Outer Continental Shelf arising from the exploration for offshore oil and gas. In order to find in favor of McDermott (and indirectly in favor of Forest), this Court would have to find that maritime law applies to oilfield contracts on the Outer Continental Shelf when a vessel is fortuitously present and has merely an incidental or no relationship at all with the object of the contract. Such a result would be in direct contravention with the legislative will as expressed in OCSLA, and articulated by this Court in *Rodrigue* – *"the particular policy judgments embodied in the OCSLA preclude in some cases the application of maritime law quite independently of the traditional principles of admiralty"*. *Laredo*, 754 F.2d at 1232. The result for which McDermott and Forest argue here, if it is to be effected, must be brought about by the legislative branch. The law as it

presently stands will not tolerate the application of maritime law to the McDermott/Capital contract. The petition should be denied.

Respectfully submitted,

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